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No. 87-855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF FAYETTEVILLE, NORTH CAROLINA,
Petitioner

v.

HENRY Z. SPELL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. May *Monell* liability be imposed against a municipality based upon findings against defendants named in their official capacity who do not possess final authority to establish municipal policy?

II. May *Monell* liability be imposed against a municipality pursuant to the "custom or usage" requirement of Section 1983 defined to mandate something more than a single isolated act but less than an "overly widespread or unduly prolonged pattern of . . . misconduct?"

III. May *Monell* liability be imposed against a municipality if acts pursuant to alleged de facto policies or customs are only "tacitly encouraged" or "proximately caused" by supervisory officials?

IV. After defending a suit resulting in a verdict of $1,000 may a municipality be forced to defend in a second trial limited to the issue of compensatory damages in which (a) venue is changed to a neighboring city, (b) no evidence relating to the merits may be introduced, (c) the jury is instructed that it may enter an award based on its perceived value of constitutional rights violated, and (d) results in a $900,000 verdict?

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* Parties to the proceeding below are Charles McDaniel, William C. Johnson, William P. Dalton, Roger T. Holman and Daniel Dixon of the Fayetteville Police Department.

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HENRY Z. SPELL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, the City of Fayetteville, North Carolina, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on July 24, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 824 F.2d 1380 and may be found at App. 1a. No opinion on the merits was issued by the District Court. The decision denying Petitioner's motions for judgment notwithstanding the verdict or new trial is reported at 606 F. Supp. 1416 and is found at App. 51a. The decision denying Petitioner's post-trial motions and granting a new trial on the issue of compensatory damages is reported at 604 F. Supp. 641 and found at App. 62a. The decision denying Petitioner's motion to dismiss and for summary judgment is reported at 591 F. Supp. 1090 and is found at App. 87a.

JURISDICTION

The judgment of the lower court was entered on July 24, 1987. On October 16, 1987, Chief Justice Rehnquist signed an order extending the time of filing to and including November 21, 1987. A-290. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983. *Civil action for Deprivation of Rights*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

STATEMENT OF THE CASE

A. The Fayetteville Police Department: A Structural Review

In 1982, the North Carolina Legislature enacted a statute which, for the first time, vested full executive powers with its City Manager.[1] The Act became effective on June 1, 1983. As of that date, the Mayor and City Council were concerned that there was no clear-cut chain of command in the police department nor any real understanding as to whom or for what its Chief, Daniel Dixon, was accountable. The City Manager and

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[1] Although the state legislature established a city manager/council form of government for Fayetteville in 1949, it kept in place statutory provisions vesting an independent Civil Service Commission (an entity designed to minimize political interference with certain departments of the city) with executive control over the police and fire departments.

Council also realized "that it was very difficult and sometimes impossible to discipline police officers under [the old] system." Finally, there were serious concerns with the Department's image, its reputation with respect to the use of excessive force and agreement that the City not only did not have control over the Department, it "didn't even have a lot of information" available to it.

At the time of the June 1 transition, Mr. John P. Smith was the City Manager. As part of his effort to improve the police department, he made the "difficult decision" to initiate an investigation of allegations of misconduct concerning Chief Dixon. Three outside investigators spent forty days on the case. In the three months following the June 1 transfer, City Manager Smith completed his investigation of Chief Dixon and was also involved with approximately twenty disciplinary proceedings against policeman.

The full impact on departmental policies resulting from the transfer of power on June 1 is reflected by a memorandum to all department members on September 2, 1983. Mr. Smith, after noting that the period between June 1 and September 2 had been "marred by allegations, investigations, counter allegations, more investigations, disciplinary actions, talk of reprisals, rumors, and an undue amount of news media publicity," announced the following measures:

1. New hiring procedures.
2. New promotion procedures.
3. New rules and regulations
4. New rank structures.
5. A grievance procedure that had been tried and tested in other City departments.
6. A review of training and discipline within the [Department]

On November 13, 1983, five and one-half months *after* the City Manager took control of the Department, the

incident which gives rise to the instant case occurred. When cross-examined as to his responsibilities on that date, Mr. Smith responded as follows:

> Q. And on June 1, 1983, you took control of the supervisory function of the police department?
>
> A. It became just like any other department of the city.
>
> . . . .
>
> Q. Major industry has its president, then it has its first vice president, second vice president, and third vice president, and they have a manager and a foreman and down to the individual person who makes the widgets . . .
>
> But who bears ultimate responsibility for the conduct of the organization, Mr. Smith?
>
> A. The chief executive officer.
>
> Q. Who bore ultimate responsibility for the condition of the Fayetteville Police Department on November 19, 1983?
>
> . . . .
>
> A. The chief executive officer of the city.
>
> Q. And who was that?
>
> A. That is myself.
>
> Q. And I ask you at this moment, Mr. Smith, do you bear and accept responsibility for the condition of the Fayetteville Police Department on November 19, 1983?
>
> A. Yes.
>
> Q. And if this jury should find on that day, a de facto policy existed, which encouraged the abuse of prisoners, or condoned it or allowed it, you accept responsibility for that, do you not, sir?
>
> . . . .
>
> A. . . . [A]s chief executive officer, I would have to accept responsibility for the activities of the department.

B. The Fayetteville Police Department: A Statistical Analysis

As pointed out in the opinion below, App. at 23a-26a, there were instances of excessive force and inadequate investigations when the Department was under the control of Chief Dixon. Petitioner's expert, who analyzed the investigative files of the Department from 1981 to 1983, however, characterized the disciplinary system as "adequate" in 1981 and "good" in 1983. During the same period, internal investigation techniques were described as going from "mediocre" to "very good." In this time frame, there were one hundred and eighty-five citizen complaints filed. This represents one complaint for every 1,630 police contacts. Forty-two percent were accepted as well founded, and of these, twenty-five and one-half percent resulted in some form of disciplinary action. During the period in question these officers (none of whom were employed at the time of trial) accounted for twenty-nine complaints.

C. McDaniel's Assault and $900,000 in *Monell* Liability

Respondent Spell incurred $2,041.74 in medical expenses as a result of injuries to his testicles.[2] The jury found that Officer Charles McDaniel caused the injury by "kneeing" him on November 19, 1983. The first trial was a major event. It consumed eighteen days and produced a record in excess of eight thousand pages. It is replete with accusations and responses to charges of excessive force, inadequate investigations, a "code of silence," overly aggressive academy training and even instances of race and sex discrimination. Indeed, under an objective reading of the transcript, the alleged assault on Respondent Spell is overshadowed by a referendum

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[2] For a complete description of the extent of injuries see App. at 39a-40a.

on the existence of one or more alleged *de facto* practices and policies within the Department.[3]

Other than testimony about the specifics of that incident, the *only* other evidence in the record linked to Officer McDaniel is: (1) his completion of a training program encompassing five hundred and fourteen hours, a significant portion of which related to constitutional law, human relations and North Carolina statutes regarding the use of force;[4] (2) the groin kick in question was taught as a defensive tactic to be employed, for example, in response to a choke hold; and (3) an internal investigation file containing over seventy pages (polygraph results, investigative reports, etc.) completed in response to a complaint filed against McDaniel and several other officers. At trial, Respondent's expert conceded that the incident was "properly, thoroughly and completely investigated," and that the Department was justified in concluding that there was no merit to the complaint.

After considerable controversy concerning proper instructions, the district judge charged the jury pursuant to its interpretation of this Court's decisions in *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978), and *Brandon v. Holt*, 469 U.S. 464 (1985). After deliberating for almost thirteen hours, the jury returned a verdict denying punitive damages and awarding $1,000 in compensatory damages against McDaniel and, through supervisory defendants named in their official capacity, the Petitioner. Post-trial motions requesting entry of a

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[3] *Cf., King v. McCown*, No. 84-1490 (4th Cir. Oct. 1, 1987) (Wilkinson, J., dissenting from order based on *Spell* authorizing discovery relating to *every* shooting incident in Baltimore, Md. for past nine years).

[4] By contrast, the expert employed by Respondent at trial testified that he had somewhere between 280 and 320 hours of training which he agreed were "not as many" as Officer McDaniel. Petitioner's expert pointed out that the training received by McDaniel nearly doubled the requirements imposed by state law.

judgment notwithstanding the verdict or, in the alternative, a new trial on all issues [5] were denied. In its opinion, the court commented:

> In this action, plaintiff is a five time convicted drug felon and trafficker. Defendant McDaniel is a young police officer and the remaining individual defendants were McDaniel's supervisors. . . .
>
> Furthermore, it is not unlikely that some jurors were concerned with assessing damages against the municipal defendant knowing or suspecting that the cost would be passed on to innocent taxpayers.

[App. at 80a-81a]

The district judge then agreed with Respondent's argument that the verdict should be set aside as inadequate and ordered a new trial limited solely to the issue of compensatory damages. In that proceeding, the Petitioner was precluded from denying liability and the second jury instructed

> to accept as fact that defendant McDaniel kneed plaintiff in the testicles on November 19, 1983 . . . and that defendant McDaniel's actions proximately resulted from a *de facto* policy, practice or custom of the supervisory defendants . . . . *The jury's task simply will be to determine the extent of plaintiff's injury, suffering and pain resulting from defendant's actions and then to compensate him accordingly.*

[App. at 84a. (Emphasis added.)]

In the same order, the court also mentioned its concern that the $1,000 verdict was a result of the jury "knowing or suspecting" that the "cost would be passed on to innocent [Fayetteville] taxpayers." Responding to this

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[5] Petitioner argued that the jury entered an impermissible compromise verdict, that is, resolved the weak evidence against McDaniel and the City by awarding inadequate damages. See App. at 75a-81a.

issue, it ordered the case transferred to the Wilmington Division of the Eastern District of North Carolina. App. at 83a-84a. Pursuant to further orders which prohibited mention of Respondent Spell's previous convictions or any reference to the first jury's verdict, a two-day trial was held in Wilmington. This jury, taking less than three hours, entered an award of $900,000 as compensatory damages.

(A) Jury instructions: "Supervisory" or "Representative" Defendants:—In addition to the City, Respondent Spell's complaint named Officer McDaniel in his individual capacity and Chief Dixon, City Manager Smith, two "command sergeants" (Dalton and Holman) and Sergeant Johnson of Internal Affairs in their official capacity. The complaint alleged that the latter defendants "jointly and severally" had the legal "duty . . . for establishing, *enforcing*, *directing*, *supervising* and controlling policies, customs, practices, usages, and procedures to be used by police officials" of the City. App. at 21a. (Emphasis added.) In denying motions to dismiss filed by defendants named in their official capacity, the district court concluded that "where *senior personnel* have knowledge of a pattern of constitutionally offensive acts by their subordinates" and fail to take remedial steps, a municipality may be liable for resulting injuries.[6] *Id.* at 114a. In addition, he pointed out that "*tacit encouragement* . . . of known constitutional violations upon the part of *subordinate personnel* can rise to the level of 'policy or custom,'" *Id.* at 114a-115a, and "[t]he law clearly allows actions against *supervisors* under § 1983 as long as a sufficient causal connection is present . . . ."[7] *Id.* at 117a. (Emphasis added.)

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[6] Citing *Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

[7] Citing *McClelland v. Facteau*, 610 F.2d 693, 695 (10th Cir. 1979).

In keeping with this theory of liability, the charge to the jury was divided into two segments. The first related to a determination of individual liability with respect to Officer McDaniel. The second:

> [A]s to the remaining defendants Smith, Dixon, Dalton, Holman and Johnson as *supervisory* officials of the Fayetteville Police Department.
>
> Your decision, as to said *supervisory* officials, will in turn determine the liability, if any, of the City of Fayetteville.

Continuing:

> The plaintiff alleges that the *supervisory* defendants . . . pursuant to the authority of their offices within the defendant [City of Fayetteville] . . . proximately caused the defendant Charles D. McDaniel to assault the plaintiff . . . .
>
> Therefore, the plaintiff seeks to hold these defendants, and through one or more of them, the City of Fayetteville, jointly liable with the defendant Charles D. McDaniel for his actual or compensatory damages.[8]

Thereafter, the court instructed that liability could be imposed upon the City by a finding that the assault resulted from a "policy, practice, custom or procedure" which a "representative defendant of the city developed, caused or maintained."[9] Having framed a general premise, the judge submitted the following issue to the jury:

> Did the assault by the Defendant Charles D. McDaniel on the plaintiff . . . proximately result from a de facto policy, custom, practice or procedure *which a representative or supervisory defendant either developed, maintained, or caused or was aware of or reasonably should have been aware of and which*

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[8] App. at 145a, 146a. (Emphasis added.)

[9] *Id.* at 149a.

> *the representative defendant had the authority to rectify, nullify, or render ineffective*, but in conformity with such policy, practice or procedure the defendant failed to act within the scope of his authority to do so . . . .[10]

In response, the jury answered "yes" to all defendants named in their official capacity save for City Manager Smith.

(B) Jury Instructions: Establishment of De Facto Policies or Customs:—The district court determined that it was not necessary for the jury to make separate, specific findings either as to the existence of specific *de facto* policies and practices or their relation to each separate defendant sued in his official capacity. As a result, a finding of liability was not accompanied by a determination as to which acts by which defendants had created customs causing the assault for which the City was to be held responsible. In addition, the burden of proof imposed on Respondent was defined as follows:

> In this regard, you should keep in mind that a single isolated act is insufficient to establish a de facto policy. By the same token, the citizens of a municipality do not have to endure an overly widespread or unduly prolonged pattern of past misconduct before municipal liability can be found.[11]

(C) Jury Instructions; Causation:—Having established the proposition that a *de facto* policy was more than an "isolated act" but something less than "overly widespread or unduly prolonged," the jury was instructed that municipal liability could be imposed if such a policy was "caused, maintained, *tacitly encouraged or condoned by their supervisory personnel*," and

> [i]f such a de facto policy expressly or *tacitly encourages* conduct depriving individuals of their con-

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[10] *Id.* at 153a-154a.

[11] *Id.* at 151a.

stitutional rights, it is sufficient to impose liability upon the city's responsible supervisory personnel, and through them, upon the defendant city itself.

Members of the jury, the term tacit encouragement—by the term tacit encouragement, the law means encouragement expressed or conveyed without words or speech. That is, encouragement implied or inferred from the actions or inactions of a person of authority.[12]

Finally, in a separate segment, an additional instruction was formulated. Liability could also be imposed if the jury found that a policy or custom had proximately caused Spell's injury, that is, if it "set in motion a series of acts by others which the representative defendant reasonably should have foreseen would cause his subordinates . . . to in fact inflict constitutional injury . . . ." [13]

(D) The Second Trial: Damages for Constitutional Injury:—As previously discussed, the trial judge set aside the $1,000 verdict as inadequate and transferred the case from Fayetteville to Wilmington for a second trial on the issue of compensatory damages. Instructions given included:

Damages may not be based on speculation, because it is only actual damages, what the law calls compensatory damages that are recoverable. *However, you are instructed that damages may be awarded for violation of a constitutional right even though these damages may be difficult to quantitatively measure.*

The law clearly recognizes the inherent value of constitutional rights, even though difficult to assess.

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[12] *Id.* at 150a-151a. (Emphasis added.)

[13] *Id.* at 152a-153a.

In addition, the following dialogue occurred between counsel and the court:

> [COUNSEL FOR McDANIEL:] . . . . And then, we end up saying that the constitutional deprivation is also an element of damages. But, it seems to me like that is a duplication of damages. That the constitutional right . . . that has been violated is the personal integrity resulting from the assault.
>
> . . . .
>
> THE COURT: I believe that is straight out of [a] Fourth Circuit opinion.
>
> [RESPONDENT'S COUNSEL:] It is my understanding that the violation of a constitutional right gives rise to a separate element of damages, which the jury may award and award damages for.
>
> THE COURT: I believe that is correct.
>
> [RESPONDENT'S COUNSEL:] One of the things which the jury can determine and award a separate award of damages for is the simple fact that a constitutional right was violated.
>
> THE COURT: I think that is correct. . . . I am going to accept your version of it.

(E) The Decision of the Fourth Circuit:—Judge Phillips, speaking for the panel, prefaced his analysis with the proposition that this Court has yet to explain the full details of *Monell* liability and that the case presents "most serious and difficult" issues.[14] Acknowledging an opinion designed to explore municipal liability inasmuch as decisions of this Court have not "yet done so," [15]

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[14] App. at 7a.

[15] App. at 15a. Among other issues found to be unanswered was imposition of *Monell* liability as a result of injuries flowing from a policy not itself unconstitutional, *id.* at 12a n.8, as and/or deficient training. *Id.* at 15a, 17a.

he conceded that the court had entered an area of "complex principles . . . [in an] evolving and difficult body of legal doctrine." [16] Following a detailed analysis of principles perceived to govern municipal liability,[17] the opinion focuses on those portions of the record documenting physical abuse, instances of failures to investigate, etc., occurring during the period in which the Department was controlled by Chief Dixon.[18]

Chief Dixon was found to have had full responsibility during the "relevant time period" [19] and that there was an undefined quantum of evidence in the record that he established a "pattern" of police misbehavior "of the specific type charged to McDaniel." [20] The court concluded that Chief Dixon's "general authority" was "shared" by "subordinate officials," and that "subdelegation[s]" of "delegated responsibilities" was "authorized by the City." [21] It further found that there was "no evidence" that before the date of Respondent Spell's injury, City Manager Smith ever sought "effectively to curb or correct the way in which Dixon, aided by his command level subordinates, was in fact exercising his formal authority. . . ." [22]

Turning attention to the trial court's instructions, Judge Phillips premised his analysis on the conclusion that although certain portions, when viewed in isolation, "might be thought technically erroneous," [23] there was

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[16] *Id.* at 29a.

[17] *Id.* at 7a-20a.

[18] *Id.* at 23a-26a.

[19] *Id.* at 26a.

[20] *Id.* at 27a.

[21] *Id.* at 27a.

[22] *Id.*

[23] *Id.* at 29a.

no reversible error. The court conceded that the instructions "focused jury considerations *more directly than was ideal* upon the culpability of each of the named" defendants as a "*possible* basis for imposing municipal liability." [24] The fact that the jury returned a verdict exonerating City Manager Smith was irrelevant since even if he had the requisite authority it was "never effectively exercised." [25] As such, the decision of the district judge to issue instructions which allowed the jury "to *infer* that final authority in fact lay in others [*i.e.*, Chief Dixon and his subordinates] as the *de facto* municipal policymakers," was affirmed.[26] With respect to alleged policies and individual defendants:

> The joinder of particular individuals as official-capacity defendants undoubtedly created an *awkwardness* for the court in explaining their status as parties not exposed to liability but whose conduct was critical to the imposition of municipal liability. But we are satisfied that the court adequately worked through the *awkwardness* and in the process sufficiently communicated the relevant principles of "policy" and "policymaking authority" as essential elements of municipal liability.[27]

The use of the term "representative defendant" in the jury charge was held to be accompanied by instructions sufficient to describe "a defendant whom the jury *must have found* to have the requisite authority . . . to have final policymaking authority." [28] In addition, the "tacit encouragement" portion of the charge was cured by a description of proximate cause, *i.e.*, setting in motion a "series of acts by others which the representative de-

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[24] *Id.* at 31a. (Emphasis added.)

[25] *Id.* at 32a.

[26] *Id.* at 32a.

[27] *Id.* at 32a-33a. (Emphasis added.)

[28] *Id.* at 34a. (Emphasis added.)

fendant should have foreseen would cause" constitutional harm.[29] Finally, reference to a "general and persistent pattern" cured whatever error there was in describing the custom or usage requirement as something not "overly widespread" or "unduly prolonged." [30]

The Fourth Circuit thus affirmed all factual and legal aspects of the case which led the jury, after eighteen days of trial and almost thirteen hours of deliberation, to conclude that the City and McDaniel should be liable for $1,000 in compensatory damages. It is also that segment of the case which was held to be binding on a second jury, located in another city and limited to hearing evidence only on the issue of damages, to return a verdict of $900,000 in less than three hours.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Petitioner maintains that, as a municipality and through powers vested in its City Manager on June 1, 1983, it initiated a series of positive, significant measures sufficient both to interrupt the acquiescence necessary to create a policy or custom and to eliminate any causal connection between past acts or omissions of Chief Dixon and the assault on Respondent Spell. Inexplicably, these assertions generated little interest in the panel below. Indeed, the Fourth Circuit opinion implies that at the time of the incident Chief Dixon was in full control of a Department in which he "delegated" or "shared" decision-making powers with line sergeants over all aspects of training, handling of prisoners, complaints and investigations. Additionally, the lower court, without explaining the basis for its conclusions, determined that the "delegations" of authority by Chief Dixon (which even the

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[29] *Id.* at 35a. (Emphasis added.)

[30] *Id.*

district judge failed to find), were "specifically authorized." These more or less factual matters, however, do not form the basis for the instant request that certiorari be granted.

The decision of the lower court conflicts with two established principles: First, *Monell* liability must be based on policies established by those having "final authority;" and second, damages may not be based on a jury's unguided estimation of the value of constitutional rights. Even more important, however, is the fact that if the Fourth Circuit's analysis is allowed to remain as precedent, the orderly development of substantive *Monell* criteria is placed in jeopardy.[31]

As reflected by this Court's docket, the lower courts and the bar desperately need *clear* pronouncements with respect to at least three issues. First, if there are incidents of police misbehavior, when do such incidents rise to the level of "custom or usage"? Second, what level of proof is required to meet the "affirmative link," *Oklahoma City v. Tuttle*, 471 U.S. 808, 824-25 n.8 (1985), "moving force," *Polk County v. Dodson*, 454 U.S. 312 (1981), requirement? This issue is especially critical in situations, such as the instant case, where there is no direct evidence linking one or more *de facto* policies and the

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[31] Language found in the opinion is unique. Never has a circuit employed terms such as "shared" and "delegated" in the context of upholding the proposition that the naming of supervisory, nonpolicymaking defendants is authorized by *Monell*. In keeping with the expansive and opaque approach taken, jury instructions characterized as less than "ideal" and as only a "possible basis" for imposing liability were approved. Errors in two portions of the charge are determined to be cured by other segments. The court's refusal to concede that *Monell* liability can only be imposed under the most stringent of standards is further highlighted by its conclusion that a jury may "infer" final authority through instructions which are "awkward" but capable of being "worked through." Those portions of the charge relating to *Monell* are found in App. at 145a-154a.

police officer involved. Third, the opinion below highlights the propostion that this Court must issue an opinion building on the analysis found in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), and resolve the issues left unanswered in *City of Springfield v. Kibbe*, 107 S.Ct. 1114 (1987).[32] Definitive, lasting criteria must be put in place for municipal liability resulting from alleged *de facto* behavior by employees. The issues are compelling and warrant full review by this Court.

II. THE DECISION BELOW AUTHORIZES THE IMPOSITION OF *MONELL* LIABILITY ON THE BASIS OF FINDINGS AGAINST NON-POLICYMAKING EMPLOYERS NAMED IN THEIR OFFICIAL CAPACITY AND IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

As explained in the Statement of the Case, from the moment of filing through completion, the district judge rejected all arguments that decisions of "supervisors" (in this case, police sergeants) could not be equated to those of the city for purposes of *Monell*. For example, in response to a post-trial motion, it construed *Brandon v. Holt*, 469 U.S. 464 (1985) (authorizing an official capacity suit against the head of a police department), to hold that "actions of . . . *supervisory* defendants, sued and found liable in their official capacities, are fairly attributable to the defendant City." App. at 64a. (Emphasis added.) Specifically:

> To the extent that defendant City argues it was not liable for any actions of any official of the Fayetteville Police Department, this argument is without merit. For the purpose of evaluating the City's potential liability under § 1983, the actions of the

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[32] See *e.g.*, App. at 15a, 17a (Judge Phillips commenting on need for decision on the merits in *Kibbe*).

> Chief of Police *and his subordinates*, in their official capacities, clearly equates with the actions of the City itself.

[App. at 65a. (Emphasis added.)]

In reviewing the district judge's conclusion that municipal liability could be based on the actions of the Police Chief "and his subordinates" the Fourth Circuit created a novel approach by concluding that representative defendants "necessarily shared" in Chief Dixon's general authority. Continuing, "official job descriptions indicated that such a sub-delegation of Dixon's officially delegated responsibilities was *specifically authorized* by the City as a contemplated aspect of his general authority as Police Chief." App. at 27a. (Emphasis added.) Thus, municipal liability initially imposed by the district court on the basis that certain defendants were "supervisors" and "subordinates" to the Police Chief was affirmed on the basis that they were "sharers of power." The analysis employed is legally and factually erroneous, is contrary to decisions of this Court and in direct conflict with decisions from other courts of appeal.

"*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1297 (1986). Thus, although *Brandon* does authorize official capacity suits against municipal policymakers as a substitute for naming a political subdivision as defendant, that decision does not put in place a *respondeat superior* approach to § 1983. Rather, *Monell* and its progeny hold that the "official policy" requirement be employed in a manner which clearly distinguishes between the acts of the municipality and its employees. *Id.* at 1298. "Municipal liability attaches only where the *decisionmaker possesses final authority* to establish municipal policy with respect to the action" causing injury. *Id.* at 1299. "The official must also be responsible for establishing *final* government policy respecting such activity before the municipality can be held liable." *Id.* at 1299-1300.

> [M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made among various alternatives by the official or officials responsible for establishing *final policy* with respect to the subject matter in question.

[*Id.* at 1300. (Emphass added.)]

This Court's interpretations of *Monell* do not contemplate a shell game which, through the use of unsupported propositions such as "shared responsibility" or the mystic incantation of the word "delegated," equates decisions of line sergeants in a police department with those possessing policymaking powers. Only those with final and ultimate responsibility for the actions or *de facto* policy or policies causing constitutional injury are properly named in their official capacity.[33]

In addition to being in conflict with decisions of this Court, the opinion of the lower court also conflicts with

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[33] Justice Brennan's hypothetical in *Pembauer* provides the clearest analysis of the role and responsibilities of governmental employees in a *Monell* setting:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decision respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its powers to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

[106 S.Ct. at 1300 n.12]

those of other circuits. The Eighth Circuit, in *Clay v. Conlee*, 815 F.2d 1164, 1169 (8th Cir. 1987), explained that although damage suits may be brought against policy and non-policymaking employees in their individual capacity, one cannot "equate . . . *supervisory liability* [for purposes of individual damage claims] with the liability of a public official in his *official capacity*." (Emphasis added.)

The Fifth Circuit, in *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985), interpreted the "edicts or acts" language in *Monell* to exclude liability as a result of acts of a city's employees "whatever their rank." Specifically, municipal liability was determined to be limited to city "policymakers" who "decide goals for a particular city function and devise the means of achieving those goals." *Id.* Subsequently, in *Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984) (en banc), the circuit reviewed a case in which the trial judge instructed the jury that they could assess liability against the city if it maintained a custom "through its highranking officials," defined as "the mayor, city council, the police chief or some similarly ranked official whose acts may fairly be said to represent official policy." *Id.* at 841 n.9. The court found the charge to be clear error and reversed:

> The trial court's instructions are much too lax . . . . The jury should have been instructed to find whether the city council had expressly or impliedly acknowledged that the mayor or the chief of police could act in their stead to set goals and to structure and design the activities of the Houston Police Department.
>
> The court further erred in allowing the jury to consider whether "some similarly ranked official" maintained a custom of using excessive force that overrode city policy. In the fact context of this case, the only "officials" involved were the mayor and city council on

> the one hand and, on the other, the *Chief and a number of lesser officers of the Houston Police Department. There was no proof in this record whatsoever that any police officer subordinate to the Chief even possibly could have occupied the role of city policymaker.* Allowing the jury to speculate whether "other officers" could be policymakers was reversible error. It also hazards a violation of the prohibition against fixing municipal liability on the basis of respondeat superior.

[*Id.* at 841-42. (Emphasis added.)]

As in *Webster*, there is no evidence in this record that any of the defendants named in their official capacity, other than Chief Dixon and City Manager Smith (who was exonerated), could lay claim to *Monell* final or ultimate authority. In direct conflict with *Webster*, the lower court held that it is not reversible error for a jury to impose municipal liability pursuant to findings that "other officers could be policymakers." The lower court affirmed a charge imposing *respondeat superior* liability. This issue warrants the grant of certiorari.

III. THE LOWER COURT'S APPROVAL OF THE TERM "TACIT ENCOURAGEMENT" AS THE CONNECTING LINK BETWEEN ALLEGED DE FACTO POLICIES AND CONSTITUTIONAL INJURY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

In *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir. 1981) and *Wellington v. Daniels*, 717 F.2d 932, 933 (4th Cir. 1983), the Fourth Circuit held that "tacit authorization" of policies leading to constitutional injury by *Monell* policymakers was sufficient to impose political-subdivision liability. In keeping with his construction of circuit precedent, the district judge instructed the jury that liability could be imposed on the city (through the supervisory defendants) if alleged *de facto* policies "tacitly encouraged" McDaniel's assault.

In *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), Chief Justice Rehnquist discussed the causal connection between an alleged "policy" and constitutional deprivations as follows:

> In this regard, we cannot condone the loose language in the charge leaving it to the jury to determine whether the alleged inadequate training would *likely* lead to "police misconduct." The fact that a municipal "policy" *might* lead to "police misconduct" is hardly sufficient to satisfy Monell's requirement that a particular policy be the "moving force" behind a *constitutional* violation.

[*Id.* at 824 n.8 (Emphasis added.)]

This past Term, the Court dismissed *City of Springfield v. Kibbe*, 107 S.Ct. 1114 (1987), as an improvident grant. Justice O'Connor's dissenting opinion discusses the unresolved issue presented by the instant case:

> Given the importance, under § 1983, of distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find *a direct causal connection* between municipal conduct and the constitutional deprivation. . . .
>
> When the execution of municipal policy does not *compel* a constitutional violation . . . the causal connection between municipal policy and the deprivation of constitutional rights becomes more difficult to discern. . . . The limits on municipal liability imposed by § 1983 require more careful analysis, in each instance, of the *municipal policy alleged* in the case, and whether a jury reasonably could conclude that the city's conduct was the moving force in bringing about the constitutional violation.

[*Id.* at 1120. (O'Connor, J., dissenting) (Emphasis added.)]

Continued reference by members of this Court to the proposition that a stringent standard is to be employed for purposes of establishing a tight nexus between al-

leged "policies" and resulting constitutional injury has impacted on the lower courts. For instance, the First Circuit approved a charge instructing the jury that the policy in question must have played a "substantial part" in bringing about the activity causing injury "and that the injury or damage was either a *direct result* or a *reasonably probable consequence* of the act or omission." *Kibbe v. City of Springfield*, 777 F.2d 801, 810 (1st Cir. 1985), *dismissed as an improvident grant*, 107 S.Ct. 1114 (1987). The Sixth Circuit, reconsidering one of its decisions following a remand in light of *Tuttle*, concluded that the moving force/high burden of proof requirement is met by the following instruction:

> [i]f you find from the preponderance of the evidence that the City . . . trained its police officers in a way that was so reckless or grossly negligent that future police misconduct was *almost inevitable* or would be properly characterized as *substantially certain to result*, then you shall find for the plaintiff . . . .

[*Rymer v. Davis*, 775 F.2d 756, 757 (6th Cir. 1985).]

Acquiescence by the lower court to instructions requiring only a "tacit encouragement" conflicts with the "affirmative link" no "loose language" requirement mandated by Justice Rehnquist's opinion in *Tuttle* and Justice O'Connor's conclusion in *Kibbe* that *Monell* requires a "direct causal connection." In addition, it conflicts with other circuits that require a linkage to a "direct result," "reasonably probable consequence," or something "almost inevitable" or "substantially certain." Certiorari should be granted to resolve the conflict.[34]

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[34] Affirmance by the lower court on the basis that the instruction also included a *Palsgraff*/proximate cause segment does not cure the error. See, *Oklahoma City v. Tuttle*, 471 U.S. 808 (1986). In addition, the issue of whether this type of instruction develops a sufficient nexus to meet the "affirmative link"/"direct result" requirement raises an important federal question which has not been, but should be, decided by this Court. *Cf., Daniels v. Williams*, 106 S.Ct. 662 (1986) (discussing section 1983 and negligence liability).

IV. THE LOWER COURT'S DECISION TO AFFIRM AN INSTRUCTION WHICH EQUATES THE "CUSTOM OR USAGE" REQUIREMENT OF SECTION 1983 WITH SOMETHING MORE THAN AN ISOLATED INCIDENT BUT LESS THAN "AN OVERLY WIDESPREAD OR UNDULY PROLONGED PATTERN OF . . . MISCONDUCT" IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

As early as 1970, this Court defined the custom or usage portion of § 1983 as covering "persistent and widespread" "permanent and well settled" practices which have been "deeply and embedded traditional ways of carrying out . . . policy." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-8 (1970). Similarly, the Court in *Monell* concluded that constitutional injury must result from a custom that is "so permanent and well settled" as to have the force of law. 436 U.S. at 691.

In the instant case, the lower court approved an instruction authorizing the jury to find the existence of a *de facto* policy or custom as *something less* than an "overly widespread or unduly prolonged pattern of . . . misconduct." In addition to flatly conflicting with *Adikes* and *Monell*, the decision conflicts with uniform interpretations given the provision by other circuits.

The Eleventh Circuit, using the preponderance of the evidence standard, authorizes the following instruction:

> Now, a custom is a persistent practice of officials which is so well settled that it has the same force as a legislative pronouncement, requiring a showing of settled government practice or deeply embedded ways of carrying out city policy.

[*Anderson v. City of Atlanta*, 778 F.2d 678, 687 (11th Cir. 1985)]

The Seventh Circuit, in rejecting a plaintiffs' claim that the instruction placed "too high a burden of proof on them," approved the following:

> A pattern or custom, as these terms have been used, is a practice or practices of county officials that are so persistent and *permanent* and well settled as to have the force of law.

[*Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1093 & n.9 (7th Cir. 1986) (Emphasis added.)]

The Fifth Circuit in *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1984), interpreted the term "custom or usage" as follows:

> In the context of the question of city liability for such persistent conduct of its employees, i.e., conduct that has become a *traditional* way of carrying out policy and has acquired the force of law, the persistent conduct must be attributable to the source of policy or law of the city, its governing body.

Subsequently, in *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984) (en banc), the circuit employed the following language stressing the requirement of *persistency* of conduct before a policy may be found:

> If actions of city employees are to be used to prove a custom for which the municipality is liable, those actions must have occurred for so long and so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the *expected, accepted practice of city employees.*

Finally, for purposes of a proper jury instruction, the Fifth Circuit flatly rejects the lower court's acceptance of something less than an "overly widespread or unduly prolonged pattern of . . . misconduct." Specifically, the *Webster* court concluded that a finding must be made of a "persistent, widespread practice which . . . is so common and well settled as to constitute a custom that fairly represents municipal policy." *Id.* at 842. The existing conflict in circuits and the lower court's failure to follow the mandate of *Adickes* warrants the grant of certiorari.

V. THE DECISION BELOW IS IN CLEAR CONFLICT WITH *MEMPHIS COMMUNITY SCHOOL DIST. v. STACHURA*

As described in the Statement of the Case, following the district judge's decision to set aside the $1,000 verdict as inadequate, the case was transferred to Wilmington, North Carolina for a trial limited solely to the issue of damages. Over the strenuous objections of counsel, instructions given the second jury specifically authorized an award of damages for violations of constitutional rights.

On appeal, Petitioner contended, among other things, that the $900,000 verdict was excessive. Following oral argument, this Court decided *Memphis Community School Dist. v. Stachura*, 106 S.Ct. 2537 (1986). The decision was immediately brought to the lower court's attention as supplemental authority in support of reversal. Although rejecting Petitioner's arguments in support of the proposition that the verdict was excessive, at no point in the Fourth Circuit's opinion is *Stachura* addressed.

In addition to the clear holding that a jury instruction authorizing damages for violation of constitutional rights is prohibited, this Court in *Stachura* determined that once tendered, it cannot be categorized as harmless error. Thus, in reviewing a jury award of $275,000 in compensatory damages and $46,000 in punitive damages, this Court reached the following conclusion:

> Although the verdict specified an amount for punitive damages, it did not specify how much of the remaining damages was designed to compensate respondent for his injury and how much reflected the jury's estimation of the value of the constitutional rights that were infringed. The effect of the erroneous instruction is therefore unknowable, although probably significant; the jury awarded respondent a very substantial amount of damages, none of which could have derived from any monetary loss. It is likely, although not certain, that a major part of

> these damages was intended to "compensate" respondent for the abstract "value" of his [constitutional] rights.
>
> [*Id.* at 2546.]

The same is painfully obvious in the instant case. Medical expenses incurred by Respondent Spell totaled $2,041.74. By no stretch of imagination can the resulting verdict of $900,000 be viewed as a proper compensatory award. The conclusion necessarily follows that the district court's decision to authorize the jury to place a monetary figure on the value of constitutional rights infringed, played a direct and significant role on the amount of the award. Pursuant to *Stachura*, certiorari should be granted and the decision below reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a petition for certiorari should issue to the United States Court of Appeals for the Fourth Circuit and the decision reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 85-1524, 85-1523, 85-1691,
85-1714 and 85-1757

HENRY Z. SPELL,

Appellee,

v.

CHARLES D. MCDANIEL, Individually and as Patrolman, City of Fayetteville Police Department, and JOHN P. SMITH, City Manager, City of Fayetteville,

Defendants,

and

WILLIAM P. DALTON, Command Sergeant, City of Fayetteville Police Department; ROGER T. HOLMAN, Command Sergeant, City of Fayetteville Police Department; WILLIAM C. JOHNSON, Director of Internal Affairs Division, City of Fayetteville Police Department; DANIEL K. DIXON, Chief, City of Fayetteville Police Department; and the CITY OF FAYETTEVILLE, N.C., a municipal corporation organized under and pursuant to the laws of the State of N.C.,

Appellants (Three Cases).

HENRY Z. SPELL,

Appellee,

v.

CHARLES D. MCDANIEL, Individually and as Patrolman, City of Fayetteville Police Department,

Appellant,

and

WILLIAM P. DALTON, Command Sergeant, City of Fayetteville Police Department; ROGER T. HOLMAN, Command Sergeant, City of Fayetteville Police Department; WILLIAM C. JOHNSON, Director of Internal Affairs Division, City of Fayetteville Police Department; DANIEL K. DIXON, Chief, City of Fayetteville Police Department; JOHN P. SMITH, City Manager, City of Fayetteville and the CITY OF FAYETTEVILLE, N.C., a municipal corporation organized under and pursuant to the laws of the State of N.C.,

Defendants.

HENRY Z. SPELL,

Appellee,

v.

CHARIES D. MCDANIEL, Individually,

Appellant,

and

CHARLES D. MCDANIEL, Patrolman, City of Fayetteville Police Department; WILLIAM P. DALTON, Command Sergeant, City of Fayetteville Police Department; ROGER T. HOLMAN, Command Sergeant, City of Fayetteville Police Department; WILLIAM C. JOHNSON, Director of Internal Affairs Division, City of Fayetteville Police Department; DANIEL K. DIXON, Chief, City of Fayetteville Police Department; JOHN P. SMITH, City Manager, City of Fayetteville and the CITY OF FAYETTEVILLE, N.C., a municipal corporation organized under and pursuant to the laws of the State of N.C.,

Defendants.

Argued June 4, 1986

Decided July 24, 1987

Before PHILLIPS, CHAPMAN and WILKINSON, Circuit Judges.

JAMES DICKSON PHILLIPS, Circuit Judge:

This is a 42 U.S.C. § 1983 action in which after two trials Henry Spell was awarded substantial damages against the City of Fayetteville, North Carolina (the City), and Charles McDaniel, a City police officer, as a result of physical injury inflicted on Spell by McDaniel while Spell was in McDaniel's custody following Spell's arrest. McDaniel and the City have appealed, assigning various trial rulings as error and challenging as unreasonable the amount of attorney fees awarded to Spell as prevailing party.

We find no reversible error in the trials and therefore affirm the judgment on the merits against McDaniel and the City. Except for its inclusion of a "contingency multiplier," we also affirm the district court's award of attorney fees.

I

Spell, admittedly inebriated on alcohol and quaaludes, was stopped by Officer McDaniel while driving an automobile in the City of Fayetteville. After talking with Spell and finding a quantity of quaaludes in his automobile, McDaniel arrested him along with a passenger in Spell's automobile, handcuffed the two of them and took them in a patrol car to the police station. There Spell was subjected to various sobriety tests, including a breathalyzer test, and was formally charged with driving while impaired and with the possession of quaaludes.[1]

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[1] Spell later pled guilty to the possession charge which was contained in a multi-count indictment that also charged two counts

Just after Spell completed the breathalyzer test and was returned, still handcuffed and inebriated, to McDaniel's direct custody, McDaniel, possibly angered by Spell's failure to respond to his questioning, and in any event without any physical provocation, brutally assaulted Spell. When Spell warded off a blow toward his head by raising his arms, McDaniel seized his handcuffed arms, pulled them down and violently kneed Spell in the groin. The blow to Spell's groin ruptured one of his testicles, necessitating its surgical removal. This resulted in irreversible sterility and of course in considerable associated pain and suffering.[2]

Spell then brought this § 1983 action naming as defendants McDaniel, the City of Fayetteville, the City Manager, the City Chief of Police, the Director of the police department's Internal Affairs Division and two police department command sergeants. He structured the action as one against McDaniel in his individual and official capacities; against the City Manager, Smith, the Police Chief, Dixon, the Internal Affairs Division, Johnson, and the two command sergeants, Dalton and Holman, in their several official capacities; and against the City as a suable municipal corporation.

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of narcotics trafficking for which he was convicted after trial. At the time of trial of this § 1983 action, he was serving a seven year sentence growing out of those convictions, a fact brought out to the jury in Spell's own testimony on direct examination.

[2] These are the essential facts necesarily accepted in substance by the jury in finding McDaniel liable. They were disputed by McDaniel, who denied making any assault on Spell and speculated that the conceded injury resulted from a pre-arrest occurrence. Though acceptance of these facts required outright rejection of McDaniel's testimony and that of another officer circumstantially corroborating McDaniel's there was more than ample evidence supporting the critical finding. The district court, denying defendant's motion for judgment n.o.v. and alternatively for new trial, expressed flat incredulity at the testimony offered to support McDaniel's denial that he ever physically assaulted Spell. *See Spell v. McDaniel*, 604 F.Supp. 641, 647-48 (E.D.N.C. 1985).

His pleaded theory of recovery against McDaniel individually was that McDaniel, acting under color of state law, had deprived him of rights secured by the fourth, fifth and fourteenth amendments by using excessive physical force against him in a custodial situation, thereby inflicting serious personal injuries.[3] For this conduct he sought recovery of money damages against McDaniel in his individual capacity.

His pleaded theory of recovery against the City of Fayetteville was that the City was liable for damages under the doctrine of *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), for the constitutional deprivation with consequent physical injuries directly inflicted by its employee McDaniel, because McDaniel's conduct was pursuant to a municipal "policy or custom." *Id.* at 694, 98 S.Ct. at 2037.

McDaniel denied inflicting any injury on Spell as a defense to the individual-capacity claim against him. The City also denied (for lack of sufficient knowledge or information) that McDaniel had inflicted injury on Spell, and alternatively denied that there was any basis for imposing municipal liability upon it under *Monell*.[4]

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[3] Spell also asserted deprivation of rights under the Eighth Amendment, and the Privileges and Immunities Clause. The district court properly dismissed these. 616 F.Supp. 1069, 1076. The district court considered the claim under both substantive due process and fourth amendment theories, treating the two as essentially congruent. 591 F.Supp. 1090, 1101, 1103. In reviewing the case, we have considered the claim as one most appropriately invoking fourth amendment protections against unreasonable uses of force in effecting and maintaining arrests. *See Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); *cf. City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816-17, 105 S.Ct. 2427, 2432-33, 85 L.E.2d 791 (1985). The defendants do not contest this as a viable basis of claim.

[4] The City (and the official capacity defendants) also raised as other "affirmative defenses" good faith immunity of the City and

The case then went to trial before a jury on the issues whether, as a matter of fact, McDaniel had assaulted Spell and was therefore liable individually, and if so, whether there existed a basis in law and fact for also imposing joint liability upon the City for the resulting constitutional deprivation.

After an 18-day trial, the jury returned verdicts finding McDaniel, in his individual capacity, jointly and severally liable. It awarded $1,000 in compensatory damages, and declined to award the punitive damages sought against McDaniel.

Spell then moved to set aside the $1,000 compensatory award as inadequate and for a new trial on the compensatory damages issue alone. The district court granted this motion, denying, *inter alia*, the defendants' countermotion for new trial on all the issues if the verdict was to be set aside for inadequacy of the damage award.

On the re-trial of the damages issue, the jury returned a verdict for $900,000 compensatory damages. After denying defendants' renewed post-verdict motions for judgment n.o.v. or, alternatively, a new trial, the district court awarded Spell attorney fees and costs totalling $335,942.57. 616 F.Supp 1069. Joint and several judgments against McDaniel and the City were then entered on the damage and fee awards.

This appeal followed.

Before us, the defendants join in contending that the district court erred in ordering a new trial on damages alone after setting aside as inadequate the first jury ver-

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the officials, the existence of an adequate state remedy (presumably under *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)) and, apparently, state law sovereign immunity for discretionary actions of the official capacity defendants. The district court properly declined to submit these as possible defenses to claims of fourth amendment and substantive due process violations.

dict; in making various evidentiary rulings; and in awarding unreasonably excessive attorney fees to Sell as prevailing party under 42 U.S.C. § 1988.

The City alone contends that the evidence did not warrant submission of the municipal liability issue to the jury and, in the alternative, that the court's jury instructions on that issue were prejudicially erroneous.

Because they are the most serious and difficult, we consider first the municipal liability issues, then the others in order.

II

The City's challenge to the submission of the municipal liability issue and the jury instructions upon it are interrelated. Both essentially question the district court's understanding, hence application ,of the law of municipal liability under § 1983, as it relates to incidents of police brutality such as that charged here.

We therefore begin by discussing that body of law as it applies to this case.

A

The Basic Principle

Municipalities are not liable under respondeat superior principles for all constitutional violations of their employees simply because of the employment relationship. *Monell*, 436 U.S. at 692-94, 98 S.Ct. at 2036-37. Instead, municipal liability results only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694, 98 S.Ct. at 2037-38.

Municipal "Policy" and "Policymaking"

While municipal "policy" is found most obviously in municipal ordinances, regulations and the like which directly command or authorize constitutional violations,

see, e.g., Monell, id., at 661, 694, 98 S.Ct. at 2020, 2037 (official pregnancy leave policy) it may also be found in formal or informal *ad hoc* "policy" choices or decisions of municipal officials authorized to make and implement municipal policy, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 1301, 89 L.Ed.2d 452 (1986) (single "policy" decision by county prosecutor).

"Policy" in this context implies most obviously and narrowly a "course of action consciously chosen from among various alternatives" respecting basic governmental functions, as opposed to episodic exercises of discretion in the operational details of government. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985); *see also Pembaur*, 106 S.Ct. at 1299 & n.9. Correspondingly, "policymaking authority" implies authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government. *See Pembaur*, 106 S.Ct. at 1299-1300 & n.12; *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir.1984) (en banc) ("policymaking authority is more than discretion . . . more than the final say-so, as a matter of practice, on what water main will be replaced today").[5]

While "finality" is a necessary attribute of "policymaking authority," the possession of "final authority" does not alone constitute a municipal official a "policymaker." The most critical factor is not the practical finality of an official's "acts and edicts," but their "policy" nature. *See Pembaur*, 106 S.Ct. at 1299-1300 (re-

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[5] This and following specifically approving citations to *Bennett v. Slidell* reflect our agreement with much of the comprehensive analysis by the en banc majority in that case of the nature of "municipal policy," "policymaking authority," and related concepts of municipal liability under *Monell*. Our extensive agreement with that conceptual analysis implies no view on the result reached on the facts of that case by the closely divided en banc court.

sponsibility for establishing policy the key); *Bennett*, 728 F.2d at 769 ("policymakers . . . decide the goals for a particular city function and devise the means for achieving those goals"). On the other hand, a municipal agency or official may have final authority to make and implement policy despite a municipality's retention of powers of ultimate control over both policy and policymaker. The question is one of authority-in-fact. A municipal governing body may not avoid attribution of policy to itself simply by officially retaining unexercised ultimate authority to countermand a policy or to discipline or discharge the policymaker. *See Bowen v. Watkins*, 669 F.2d 979, 989-90 (5th Cir.1982); *see also Bennett*, 728 F.2d at 769 (policymaking authority exists despite retention by governing body of "prerogative of the purse and final legal control [to] limit or revoke the authority").

Municipal "Custom" and its Creation

"Official policy" in the relatively narrow sense of discrete, consciously chosen courses of action by "policymakers" is not the only basis for imposing municipal liability. "Custom, or usage," in the exact language of § 1983, may also serve. *Monell*, 436 U.S. at 690-91, 98 S.Ct. at 2035-36.[6] And the existence of such a "custom

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[6] As Justice Stevens continues to point out, the term "policy" is not found in the text of § 1983, while "custom, or usage" is. *See Pembaur*, 106 S.Ct. at 1302 (Stevens, J., concurring); *Tuttle*, 471 U.S. at 841-42, 105 S.Ct. at 2445-46 (Stevens, J., dissenting). Nevertheless, "policy" has acquired the separate and distinctive meaning described in text as a result of the Supreme Court's municipal liability decisions in *Monell* and its progeny. That the Court recognizes "municipal policy" in the judicially developed sense and "custom, or usage" in the statutory sense as different legal concepts seems plain, though the Court has not since *Monell* had the occasion to discuss "custom, or usage" in the detail it has discussed "policy." *See Pembaur*, 106 S.Ct. at 1299 n. 10 (distinction noted and viability of claims under both recognized).

or usage" may be found in "persistent and widespread . . . practices of [municipal] officials [which] [a]lthough not authorized by written law, [are] so permanent and well-settled as to [have] the force of law." *Id.* at 691, 98 S.Ct. at 2036 (citing and quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970)).

Attribution and Causation as Essentials of Municipal Fault

Because municipal liability results only when the municipality itself can be directly charged with fault[7] for a constitutional violation, it results only when policy or custom as above defined is (1) fairly attributable to the municipality as its "own," *Monell*, 436 U.S. at 683, 98 S.Ct. at 2032, and is (2) the "moving force" behind the particular constitutional violation. *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981).

Attribution of "Policy"

Policy, in the narrow sense of discrete, consciously adopted courses of governmental action may be fairly attributed to a municipality either because (1) it is directly "made by its lawmakers," i.e., its governing body, *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037, or (2) it is made by a municipal agency, *see, e.g., id.* at 661 &

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[7] Though criticized by commentators, *e.g.*, Mead, *42 U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 N.C.L.Rev. 517, 556-60 (1987), and still disputed by one member of the Supreme Court, *see Tuttle*, 471 U.S. at 834-44, 105 S.Ct. at 2441-47 (Stevens, J., dissenting), the settled Supreme Court position is that direct municipal fault is the essence of municipal liability under § 1983. *Id.* at 818, 105 S.Ct. at 2433 (plurality opinion) ("fault-based analysis" required); *id.* at 830-31, 105 S.Ct. at 2439-40 (Brennan, J., concurring) (absent independent evidence of policy or custom, "no way of knowing whether the city is at fault").

n.2, 98 S.Ct. at 2020 & n.2 (policy of city board of education and department of social services) or official, *see Pembaur*, 106 S.Ct. at 1300-01 (policy decision of county prosecutor), having final authority to establish and implement the relevant policy. A municipal agency or official may have final policymaking authority by direct delegation from the municipal lawmaking body, *see, e.g., Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir.1983) (delegation of law enforcement policymaking authority to police chief assumed) or by conferral from higher authority, *see, e.g., Pembaur*, 106 S.Ct. at 1301 (county prosecutor's authority to act for county conferred by state law). Delegation may be express, as by a formal job-description, *see Bennett*, 728 F.2d at 769, or implied from a continued course of knowing acquiescence by the governing body in the exercise of policymaking authority by an agency or official, *see id.* (delegation "by conduct or practice [which] encourage[s] or acknowledge[s] the agent in a policymaking role").

Attribution of "Custom"

"Custom and usage," in the sense of "persistent and widespread . . . practices" by municipal agents and employees, may be attributed to a municipality when the duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the municipal governing body that the practices have become customary among its employees. *See id.* at 768. Actual knowledge may be evidenced by recorded reports to or discussions by a municipal governing body. Constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of them. *See id.*

Similarly, where a municipal policymaker has actual or constructive knowledge of such a course of customary practices among employees subject to the policymaker's

delegated responsibility for oversight and supervision, the "custom or usage" may fairly be attributed to the municipality as its own. *See id* at 769 ("custom" may be attributed to municipality through policymaker who has acceded to it).

Causation

When a municipal "policy or custom" is itself unconstitutional, i.e., when it directly commands or authorizes constitutional violations, *see, e.g., Monell*, 436 U.S. at 661, 694-95, 98 S.Ct. at 2020, 2037-38 (pregnancy leave policy), the causal connection between policy and violation is manifest and does not require independent proof. *See Tuttle*, 471 U.S. at 822, 105 S.Ct. at 2435 ("no evidence . . . needed [in such a case] other than a statement of the policy"). But a policy or custom that is not itself unconstitutional in this strict sense must be independently proven to have caused the violation.[8] Proof merely

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[8] Some members of the Supreme Court have raised the question whether municipal liability may ever be imposed except for "policy" which is "itself unconstitutional," as, e.g., was that in *Monell*, or in *Pembaur* (by retroactive declaration). *See Pembaur*, 106 S.Ct. at 1301-02 (White, J., concurring) (where controlling law forbids particular conduct, municipal officials "cannot be said to have the authority to make contrary policy"); *Tuttle*, 471 U.S. at 824 n. 7, 105 S.Ct. at 2436 n. 7 (Rehnquist, C.J., plurality opinion) (question reserved). Despite these express reservations, we assume that a majority of the Court is not now prepared so drastically to limit the scope of municipal liability under § 1983. We consider this at least implicit in the *Tuttle* plurality's reservation of the issue whether, subject to proper jury instructions imposing strict proof requirements, liability might be imposed on the basis of a deficient training "policy." *See id.*, at 823-24 & n. 7; 105 S.Ct. at 2436-37 & n. 7; *see also City of Springfield, Massachusetts v. Kibbe*, —— U.S. ——, ——, ——, 107 S.Ct. 1114, 1117, 1120, 94 L.Ed.2d 293 (1987) (O'Connor, J., dissenting from dismissal of writ of certiorari as improvidently granted) in which four members of the Court, including Chief Justice Rehnquist and Justice White who had earlier expressed reservations on the point, and Justice Powell, who did not participate in *Tuttle*, apparently agree that in appropriate cases, municipal liability might be based upon deficient training "policy".

that such a policy or custom was "likely" to cause a particular violation is not sufficient; there must be proven at least an "affirmative link" between policy or custom and violation; in tort principle terms, the causal connection must be "proximate," not merely "but-for" causation-in-fact. Id. *at 823, 105 S.Ct. at 2436*; id *at 833 n. 9, 105 S.Ct. at 2441 n. 9 (Brennan, J., dissenting)*; see also Wellington, *717 F.2d at 936 (policy must be shown to have given at least "tacit authorization" to unconstitutional employee conduct). Neither the existence of such a policy or custom nor the necessary causal connection can be established by proof alone of the single violation charged.* Tuttle, *471 U.S. at 823, 824, 105 S.Ct. at 2436*; Wellington, *717 F.2d at 937.*

The Principles as Applied to Constitutional Violations by Police

Application of these general principles to claims of municipal liability for specific incidents of unconstitutional conduct by law enforcement officials has raised special conceptual problems for the courts. This undoubtedly reflects conflicting, fundamental policy concerns about the exposure of municipalities to monetary liability for this most fundamental of "constitutional torts" at the local government level.

On one hand, there is concern that actual municipal culpability in these matters should not be masked and final responsibility avoided by overly rigid interpretations and applications of the concepts of policy or custom, policymaking authority, and causation. *See, e.g., Tuttle,* 471 U.S. at 833 n. 8, 105 S.Ct. at 2441 n. 8 (Brennan, J., concurring) (rejecting "metaphysical distinction between policies that are themselves unconstitutional and those that cause constitutional violations"). On the other hand, there is concern that a back-door vicarious liability principle should not be developed by overly tolerant interpretations and applications of those same key concepts.

See, e.g., id at 821, 105 S.Ct. at 2435 (plurality opinion) (overly tolerant concepts of policy and causation would impose municipal liability "simply because the municipality hired one 'bad apple' ").

Municipal policymakers, including governing bodies, may of course in theory directly authorize unconstitutional police conduct just as any other form. In practice, however, such authorizations—"policies unconstitutional in themselves"—are understandably rare, or at least rarely surface in litigation in this realm. "Official" statements of law enforcement policy almost inevitably will specifically condemn rather than condone uses of excessive force or other unconstitutional conduct by police. And where there is no official statement respecting specific police conduct, it will be difficult if not impossible to imply an official municipal policy directly authorizing conduct at odds with federal and state constitutions and laws. *Cf. Pembaur*, 106 S.Ct. at 1301 (White, J., concurring) ("Local law enforcement officers are expected to obey the law . . . .").

Typically, therefore, claims of municipal liability for specific constitutional violation by police have had to seek municipal fault in other sources than direct authorizations by policymakers and the necessary causation between fault and violation in more attenuated connections than direct commands.

Two basic theories have emerged for imposing municipal liability in the more typical situation where fault and causation cannot be laid to a municipal policy "itself unconstitutional." The principal theory locates fault in deficient programs of police training and supervision which are claimed to have resulted in constitutional violations by untrained or mis-trained police officers. A second theory, sometimes imprecisely subsumed within the first, locates fault in irresponsible failure by municipal

policy-makers to put a stop to or correct a widespread pattern of unconstitutional conduct by police officers of which the specific violation is simply an example.

Although we have implicitly recognized the general viability of these theories in the course of rejecting particular claims of municipal liability, we have not been required earlier to elaborate their full details;[9] nor has the Supreme Court yet done so.[10] This case requires that we now do so, guided primarily by those Supreme Court decisions that have most directly suggested the theories' bounds.

At the outset, we accept that in appropriate circumstances either or both of these theories may appropriately be invoked to impose municipal liability under the basic *Monell* principles above summarized. But we also accept that the most relevant Supreme Court decisions now re-

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[9] Our only published opinion to date dealing with a claim of municipal liability for a specific act of police brutality is *Wellington*, 717 F.2d 932. In that case we recognized the general viability of both theories, but concluded without full development of the theories that neither was supported by sufficient evidence on essential elements. *See id.* at 936 & n. 3 (custom); *id. at* 936-37 (policy). *Cf. Milligan v. City of Newport News*, 743 F.2d 227 (4th Cir. 1984) (claim of deficient training of paramedical personnel dismissed on pleading; insufficient allegations of policy and causation).

[10] The Supreme Court's grant of certiorari to review *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985), promised a definitive treatment of the deficient training theory that did not, however, eventuate. Following submission of the instant appeal to this court, the Court dismissed the *Kibbe* writ as improvidently granted. *City of Springfield, Massachusetts v. Kibbe*, —— U.S. ——, 107 S.Ct. 1114, 94 L.Ed.2d 293 (dismissed for inability to reach related question of whether more than negligence in training was required to establish municipal liability). This left municipal liability doctrine in the state of development that had been reached in *Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 701, where the Court had purported to take only a "small" further step toward definitive development of the doctrine's full contours, including the deficient training theory. *Id.* at 810, 105 S.Ct. at 2429.

quire that each of the theories be carefully controlled at critical points to avoid imposing by indirection a form of vicarious municipal liability flatly rejected by *Monell*. Those critical points are (1) identifying the specific "policy" or "custom"; (2) fairly attributing the policy and fault for its creation to the municipality; and (3) finding the necessary "affirmative link" between identified policy or custom and specific violation. *See Tuttle*, 471 U.S. at 822-24, 105 S.Ct. at 2435-37 (plurality opinion); *id.* at 827-33, 105 S.Ct. at 2438-41 (Brennan, J., concurring); *see also, Kibbe*, —— U.S. at ——, 107 S.Ct. at 1120-22 (O'Connor, J., dissenting from dismissal of writ).

On this basis, we conclude as follows respecting the two theories.

Deficient training as culpable municipal "policy"

The way in which a municipal police force is trained, including the design and implementation of training programs and the follow-up supervision of trainees, is necessarily a matter of "policy" within the meaning of *Monell*. To the extent a particular training policy is fairly attributable to a municipality, it is "official municipal policy." To the extent such an official municipal policy has deficiencies resulting from municipal fault that then cause specific constitutional violations by deficiently trained police officers, the municipality is liable under 42 U.S.C. § 1983.

Such a training policy is fairly attributed to a municipality when it is designed, implemented, and its trainees supervised by municipal officials to whom the municipal governing body has effectively delegated final authority so to act. Delegation to such policymakers may be by formal directive, such as a job description, or by informal acquiescence in a known, continued exercise of authority, or by both in combination. Policymaking authority with respect to police training, as generally, is

final if it is effectively final; the mere fact that the governing body or some other official retains ultimate but unexercised authority over both police training policy and policymakers does not allow a municipality to disclaim the policy as its own.

Only those deficiencies in police training policies that result from policymaker fault of at least the degree of deliberate indifference to or reckless disregard for the constitutional rights of persons within police force jurisdiction can give rise to municipal liability; mere negligence on the part of policymakers is not sufficient.[11] Subject to this fault requirement, training policy deficiencies for which municipal liability may be imposed include not only express authorizations of specific unconstitutional conduct, but tacit authorizations, and failures adequately to prohibit or discourage readily foreseeable conduct in light of known exigencies of police duty.

Finally, a sufficiently close causal link must be shown between potentially inculpating training deficiency or deficiencies and specific violation. This requires first that a specific deficiency rather than general laxness or ineffectiveness in training be shown. It then requires that

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[11] Whether the mere negligence of municipal policymakers in training their police is a sufficient degree of fault to impose municipal liability was left unresolved by the Supreme Court when it declined to decide the issue in *Kibbe*. *See supra* note 10. "Deliberate indifference" therefore remains the minimal standard in this circuit, on the authority of *Wellington*, 717 at 936 ("tacit authorization" of "deliberate indifference"). Though the question remains open in the Supreme Court, Justice O'Connor's opinion dissenting from dismissal of the writ in *Kibbe* indicates that at least four members of the Court would impose a minimal standard of "reckless disregard for . . . or deliberate indifference to [the rights of persons]." *Kibbe*, —— U.S. at ——, 107 S.Ct. at 1121; *see also Fiacco v. City of Rensselaer, New York*, 783 F.2d 319, 326 (2d Cir. 1986) ("deliberate indifference"); *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983) (same); *Patzner v. Burkett*, 779 F.2d 1363, 1367 (8th Cir. 1985) (same).

the deficiency or deficiencies be such, given the manifest exigencies of police work, as to make occurrence of the specific violation a reasonable probability rather than a mere possibility. In common parlance, the specific deficiency or deficiencies must be such as to make the specific violation "almost bound to happen, sooner or later," rather than merely "likely to happen in the long run." *See Patzner*, 779 F.2d at 1367 (training so deficient that "police misconduct inevitably occurs").

Unconstitutional police practices as municipal "custom or usage" by condonation

Without having been directly authorized, or tacitly encouraged, or inadequately trained in specific ways by responsible municipal policymakers, police officers, like other public employees, may fall into patterns of unconstitutional conduct in their encounters with suspects, arrestees, persons in custody and others involved in law enforcement situations. This may result from a variety of factors not sufficiently traceable *in origin* to any fault of municipal policymakers to warrant treating the conduct as a reflection of "municipal policy" in the *Monell* sense.

If these unconstitutional practices become sufficiently widespread, however, they may assume the quality of "custom or usage" which, per § 1983, has the force of state "law" for purposes of invoking the remedies provided by § 1983. *Adickes*, 398 U.S. at 167-68, 90 S.Ct. at 1613-14. Such a developed "custom or usage" may then become the basis of municipal liability, but only if its continued existence can be laid to the fault of municipal policymakers, and a sufficient causal connection between the "municipal custom and usage" and the specific violation can then be established.

Municipal fault for allowing such a developed "custom or usage" to continue requires (1) actual or constructive knowledge of its existence by responsible policymakers,

and (2) their failure, as a matter of specific intent or deliberate indifference, thereafter to correct or stop the practices. Constructive knowledge may be inferred from the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duty of responsible policymakers to be informed, or combinations of those. The inculpating knowledge, whether actual or constructive, may be either that of the municipal governing body itself, or of municipal officials having final policymaking authority in municipal law enforcement matters.

A sufficiently close causal link between such a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom. Again, as in the case of deficient training policy, failure to correct the known practices must be such as to make the specific violation "almost bound to happen, sooner or later," rather than merely "likely to happen in the long run."

Deficient training "policy" and
condoned "custom and usage" as alternative theories
for establishing municipal liability

Because the "deficient training policy" and "condoned custom" theories are simply alternative ways of establishing municipal fault, hence potential *Monell* liability, for specific constitutional violations by police officers, they may be asserted as alternative theories in particular litigation. Fed. R. Civ. P. 8(e)(2). If sufficiently supported by proof, they may then be submitted to a jury as alternative bases for liability, and noncumulative liability may be found on the basis of either or both. This simply reflects the fact that in particular cases the question whether the "moving force" behind a specific violation was a policy that originated with municipal policymakers, or a custom that policymakers did not originate

but effectively condoned, or both, may be determinable only by litigation. The most critical substantive difference between the two theories is that municipal fault may be ascribed for the first specific violation that results from proven policy, *Tuttle*, 471 U.S. at 822, 105 S.Ct. at 2435; *Pembaur*, 106 S.Ct. at 1297 n.6, while fault for a violation resulting from condoned custom can only be ascribed when a pattern of comparable practices has become actually or constructively known to responsible policymakers, *Wellington*, 717 F.2d at 936 ("knowledge [may] be imputed to the supervisory personnel" only on basis of "history of widespread abuse"). Closely related is the principle that just as proof of a single violation will not support the inference that the violation resulted from a municipal "policy" of deficient training, *see Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791, so it obviously cannot support an inference that the violation resulted from a municipally condoned custom of comparable practices, *see Wellington*, 717 F.2d at 936.

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As above outlined, the substantive requirements for establishing municipal liability for police misconduct are stringent indeed. The critical Supreme Court decisions have imposed this stringency in a deliberate effort to avoid the indirect or inadvertent imposition of forms of vicarious liability rejected in *Monell*. The City here contends that the evidence was insufficient to meet those stern substantive requirements, and that the district court therefore erred in denying its motions for directed verdict and judgment n.o.v.

We disagree. We conclude instead that the evidence was sufficient to support the jury verdict imposing municipal liability on either deficient training policy or condoned custom or usage theories.

A good framework for assessing the sufficiency of the evidence is the claimant's core allegations of municipal

liability, for his proof followed his allegations with considerable faithfulness and in great factual detail.

Specifically, Spell pleaded that at the time of McDaniel's assault upon him the various city officials named as defendants, "jointly and severally," had the legal "duty . . . for [sic] establishing, enforcing, directing, supervising and controlling policies, customs, practices, usages, and procedures to be used by police officials" of the City, so that their "edicts and/or acts" might "fairly be said to represent the official policy" of the City; that acting within that "duty" these named officials had by various acts of omission and commission "foster[ed] and encourage[d] an atmosphere of lawlessness, anarchy, repression and a repetitive policy, custom and practice of aggressive, abusive, and assaultive behavior and procedures toward individual detainees and arrestees which [on the date of McDaniel's assault on Spell] represented the policy, practice, custom, usage and procedure" of the City, and that McDaniel's assault upon Spell was "in furtherance of . . . the practice, custom and procedure" of the City.

In greater detail, the complaint alleged, *inter alia*, that these defendant officials,

> with knowledge of repeated allegations of abusive and assaultive behavior toward . . . detainees and arrestees by [City] police officers . . . repeatedly . . . fail[ed] to enforce established procedures to insure the safety of individuals arrestees and detainees; . . . establish[ed] and enforce[d] quota systems for arrests and citations . . .; . . . fail[ed] to discipline . . . police officers . . . who had been found to have committed abusive and assaultive behavior toward . . . detainees and arrestees; fail[ed] and refuse[d] to competently investigate allegations of abuse and assault . . . by . . . police officers . . .; reprimand[ed] . . . intimidate[d], demote[d], and

> fire[d] police officers and officials who reported acts of abuse of authority by other[s] . . .; cover[ed] up acts of misconduct and abuse of authority by individual police officers and officials; . . . reward[ed] and commend[ed] . . . police officers who displayed aggressive, abusive and assaultive behavior towards . . . detainees and arrestees; repeatedly . . . fail[ed] to adequately train and educate police officers in the use of reasonable force and proper use of authority; repeatedly fail[ed] to adequately supervise the actions of police officers and officials under their control and supervision.

As indicated, plaintiff's evidence substantially tracked these essential allegations. Though that evidence was of course disputed in many details by the defendants' countering evidence, much of it was undisputed and that which was disputed was not made manifestly incredible or implausible by anything in the record. Under the settled standard for assessing the sufficiency of evidence to survive a motion for directed verdict or judgment n.o.v., *see, e.g., Lovelace v. Sherwin-Williams,* 681 F.2d 230 (4th Cir. 1982), plaintiff's evidence clearly sufficed to establish the essential elements of both theories of municipal liability above summarized.

Assuming the credibility of the most critical oral testimony adduced by plaintiff and assessing the total evidence in its most favorable light, there emerged a picture of a police department whose members were either positively encouraged by training and deliberate cover-up to engage in uses of excessive force of the very type charged to McDaniel; or were tacitly encouraged to continue self-developed practices of this type by the deliberate failure of responsible municipal officials to exercise discipline or corrective supervision to halt the widespread, known practices; or were encouraged or authorized by both in combination.

To establish the existence of such a municipal policy or custom as the effective cause of Spell's injury, plaintiff relied principally upon the testimony of seven lay citizens of the City, eight present or former officers of the City police department, an assistant state district attorney, the former legal advisor to the police department and upon internal records of the City police department. This evidence was essentially concentrated upon a time period of three years preceding McDaniel's assault on Spell.

The lay witnesses testified to a number of observed or directly experienced acts of brutality by city police officers of the type charged to McDaniel. They further testified that in each instance they filed complaints with the police department which resulted in no corrective or punitive action.

Even more critical was the testimony of former and still serving members of the police department. Officer Livingston testified to various incidents involving excessive uses of force by City police officers which were not punished because of an effective "code of silence" within the department; that City police officers were specifically trained in the technique of kneeing or grabbing testicles in order to subdue arrestees or persons in custody; that he had been concerned about the prevalence of physical violence within the department and had never heard of anyone being disciplined for such violence.

Officer Luskis testified to an observed pattern and specific incidents of brutality and excessive uses of force by members of the department; that he had seen new officers being trained in the technique of kneeing persons in the groin and that McDaniel's kneeing of Spell was consistent with the training that he had received in the department; that there was little reason to report observed acts of brutality because his supervisor had told him that there was nothing that could be done about it.

Former officer Gardner testified that uses of excessive, unwarranted force were condoned by her supervisors, and that when she complained she was forbidden by her superior to interrupt or complain again about such incidents.

Officer Pirro, a twenty-five year veteran of the department, testified that defendant Dixon's philosophy as chief of police was to "kick ass and take names"; [12] that Dixon —wanted "supercops" tougher than the soldiers at nearby Ft. Bragg; and that to further this goal, Dixon set up his own police academy to screen out women and non-aggressive male candidates.

Officer Fischer testified that Chief Dixon and defendant Holman attempted to project "tough guy" images in their training of recruits; that in his opinion they condoned the use of excessive force on arrestees; and he corroborated Officer Livingston's testimony that there was an effective "code of silence" within the department which covered up such incidents.

Former Officer Matthews identified two former police officers rehired by Chief Dixon who Dixon knew to be overly aggressive characterizing as "one of the most brutal men I have ever seen."

Douglas Canders, the former legal advisor to the police department, testified that disciplinary procedures within the department had broken down to the point of being disregarded, in many instances by direction of Chief Dixon; that Chief Dixon advocated the use of excessive force by police officers in dealing with arrestees, and believed that corrective action should not be taken

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[12] Another witness, Ammons, explained that this vulgarism was commonly used in the department to refer to a routine police practice of approaching any suspicious group activity by first indiscriminately manhandling its participants then attempting only later to sort out the innocent and the culpable, i.e., "take names."

to punish or prevent its continuation; that he, Canders, left the department because of Chief Dixon's attitude favoring the use of excessive force in police encounters.

James Ammons testified that while serving as an assistant state district attorney he had occasion to investigate and successfully prosecute two members of the police department for physical assaults upon suspects, one occuring upon the steps and in the lobby of the department's center; and that in his opinion, based upon his personal observations and conversations with police officers, "the police department condoned and encouraged officers to use force and intimidation first, then to find out what the problem—what the situation—was" later.

McDaniel himself testified in deposition that he had been taught in the Fayetteville Police Academy, set up by Chief Dixon and run by Dixon and Sergeant Holman, that striking or grabbing the testicles of an arrestee was an accepted method of subduing him.

Among the specific acts of police brutality recounted by these witnesses were the beating of a 14-year old boy by the defendant, Sergeant Dalton, while the child lay handcuffed on the ground in the presence of his mother and grandmother; the kneeing of a man's testicles while the man was being attended by medical personnel; and pulling suspects from an automobile and beating them in the head and face while arresting and handcuffing them.

Finally, the plaintiff introduced into evidence police department records that graphically corroborated the testimonial evidence that specific instances of police brutality during the relevant time period were frequent but that complaints about them were consistently dismissed or disregarded, frequently with but cursory investigation. Referring to this evidence, the district court noted—with complete support in the record—that "the

instances of confirmed and uncontradicted misconduct demonstrated in Defendant's own internal affairs documents was . . . devastating to defendants' case."

Evidence locating responsibility for this state of affairs was equally compelling in support of plaintiff's claim of municipal liability. Most critically, the official job description for the position of Police Chief during the relevant period described it in general as "directing the full activities of the Police Department." In more detail, it specified, inter alia, that the Police Chief "plans, programs, directs and evaluates the operation of the Police Department, . . . formulates and implements police policy, procedures, rules, regulations and programs; . . . promotes, assigns and disciplines all personnel." That this job description accurately described the authority in fact exercised by Chief Dixon during the relevant time period was indisputably corroborated by other evidence. Most critical perhaps was the testimony of defendants' own expert in police administration. In responding to the specific question, "Who makes policy for a police department?" he first defined "policy" as the "broad overall generalities or guidelines of where a department is going," and then opined that

> [p]olicy is established by the chief of polcie and in this instance . . . with the concurrence or acquiescence of the city manager, perhaps. But the chief of police has the responsibility for overall guidance—the policy. Procedure, which is how that policy is implemented, is the responsibility of the chief of police to develop in concert with his command officers.

Other testimony indisputably established that Chief Dixon fully assumed and acted upon the authority formally defined in this job description as verified by defendants' expert witness. There was evidence that Dixon set up the Police Training Academy in which McDaniel, with others, received training; that he effectively set the

tone of that training program, participating directly in its operation with Command Sergeant Holman, to whom he had delegated the requisite authority. There was further evidence, earlier noted, that in exercising his general authority over matters of supervision and discipline of police officers, he established a pattern of condonation, cover-up, and disregard of reported police misconduct of the specific type charged to McDaniel.

It was conceded that Dixon as Police Chief was formally subject in all of this to the ultimate authority of the City Manager, and of course to the City's governing body. But there was no evidence that either of these ever sought before the date of Spell's injury effectively to curb or correct the way in which Dixon, aided by his command level subordinates, was in fact exercising his formal authority to train and supervise members of the police department as a critical aspect of his general authority to "direct[] the full activities of the Police Department."

Finally, the evidence revealed that Dixon's general authority in these matters was necessarily shared, both in the setting and the implementing of policies and programs, with subordinate officials, including the three Command Sergeants, Dalton, Holman, and Johnson, who were joined with Dixon as official capacity defendants. Again, official job descriptions indicated that such a subdelegation of Dixon's officially delegated responsibilities was specifically authorized by the City as a contemplated aspect of his general authority as Police Chief.

This is but a general summary of the most critical evidence in a voluminous trial record related to the question of municipal liability. Viewed in its totality and under the appropriate standard, it amply supported submission of the claim of municipal liability to the jury, and the resulting jury verdict imposing liability.

More specifically, the evidence was sufficient to support findings by a properly instructed jury that at the critical time in issue, by formal delegation of the City's governing body, Police Chief Dixon was an authorized policymaker for the City of Fayetteville in matters of law enforcement, including specifically the training and supervision of members of the City Police Department in matters pertaining to physical encounters with arrestees and persons in lawful custody; that acting pursuant to that policymaking authority, Chief Dixon, in concert with subordinate command officers to whom he had duly delegated the requisite authority had established and implemented a training program that was specifically deficient in its express or tacit encouragement of uses of excessive physical force in such encounters; that this deficiency resulted from the deliberate indifference of Chief Dixon and his authorized subordinates to the constitutional rights of persons within the City's jurisdiction who might come into contact with deficiently trained police officers; that as a direct result of the deficient training which he had received under this training policy, defendant McDaniel brutally assaulted and injured plaintiff Spell.

Alternatively, or additionally, the evidence was sufficient to support findings by a properly instructed jury that at the critical time widespread uses of excessive force by members of the City's police department had occurred and were known to Police Chief Dixon and his duly authorized subordinates who shared authority and responsibility for supervision and discipline of police officers engaged in such conduct; that Chief Dixon and his authorized subordinates however condoned such practices by deliberate cover-up, disregard and positive encouragement, causing the practices to continue as an established custom or usage; that this condonation resulted from the deliberate indifference of Chief Dixon and his authorized subordinates to the constitutional rights of persons within the City's jurisdiction who might

have encounters with police officers engaging in such practices; and that in specific accord with and in furtherance of this condoned custom or usage, McDaniel brutally assaulted and injured Spell.

C

Closely related to its argument that the evidence was insufficient to support a finding of municipal liability under *Monell* principles rightly interpreted, is the City's argument that the district court committed a number of reversible errors in its jury instructions explaining and applying those principles. We disagree.

Tested rigorously against the concededly complex principles as they have now evolved, the instructions were understandably not precise in every critical detail, and certain portions if considered only in isolation might be thought technically erroneous. But construed overall and in light of the evidence and the specific legal theories upon which the claim and defense were tried, we find no error requiring reversal. The test of adequacy of instructions properly challenged on appeal is not one of technical accuracy in every detail. It is simply the practical accuracy in every detail. It is simply the practical one of whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party. *See generally* 9 Wright & Miller, *Federal Practice and Procedure: Civil*, § 2558 (1971). Tested in this light, the instructions challenged on appeal pass muster; indeed are rather remarkable for their overall accuracy and prescience in explaining what at the time was, and still remains, an evolving and difficult body of legal doctrine.

We note at the outset that there is a substantial question whether the City objected to the jury instructions at trial at the appropriate point and with sufficient specificity to preserve any right to challenge them on appeal.

Fed.R.Civ.P. 51. We have decided nevertheless to consider their challenges, but in doing so we further note that the City's formal assertions of error on appeal in turn suffer from considerable imprecision, so that fair review is made doubly difficult.

As we understand the City's arguments in brief, the most critical of its challenges trace ultimately to problems associated with the way the lawsuit was structured as to parties-defendant. Discussion of the challenges requires a brief description of the party-structure problem. As noted in our opening recitation of the procedural history of the case, the plaintiff joined as named defendants on its municipal liability claim Smith, the City Manager, Dixon, the Chief of Police; Dalton, Holman, and Johnson, Police Department Sergeants; and the City itself. The named officials were joined originally and remained parties only in their respective official capacities; the City was not originally joined but was added later by amendment.

While this ultimate structuring of parties defendant was not technically erroneous, it was not required in order to prosecute a claim of municipal liability to effective judgment against a municipality. Where, as here, no claim against officials in their individual capacities was made, a simpler, technically correct, and by far preferable structuring would have been to name the City as the sole defendant. *See Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985).[13] In the event, the more cumber-

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[13] The procedural implications of official capacity suits against municipal officials has created a more general confusion that has only recently been authoritatively resolved and that may understandably have been reflected in the party structuring and judicial handling of this lawsuit. *See Brandon v. Holt*, 469 U.S. 464, 471-73, 105 S.Ct. 873, 878-79, 83 L.Ed.2d 878 (1985) (implications and possible basis of confusion explained in light of evolving municipal

some party structuring here produced the problems above noted. Specifically, it apparently led the district court to frame its instructions and its verdict submission in ways that focused jury considerations more directly than was ideal upon the culpability of each of the named defendant-officials as a possible basis for imposing municipal liability. Most critically, the court submitted a special verdict form that required the jury to find as to each of the named defendant-officials whether he had "developed" a "de facto" policy or failed to "nullify" a known "custom" that proximately caused McDaniel's assault upon Spell. The jury dutifully responded by answering "Yes" as to each of the defendant-officials except City Manager Smith, as to whom it answered "No."

Seizing upon this form of verdict submission in conjunction with its related instructions, the City urges two points.

The first is a narrow one that probably goes more fundamentally to the sufficiency of evidence to support submission of the issue in the form used than to the related jury instructions. Specifically, it is asserted that on the evidence it was not proper to allow the jury to consider that any of the defendant-officials other than City Manager Smith could have been a *Monell* "policymaker" in the matters at issue when Spell was injured. This was on the basis that undisputed documentary evidence established that until June 1, 1983, some five months before Spell's injury, the City Civil Service Commission possessed final authority in all matters of police administration, and that after June 1, 1983, this final authority was reposed exclusively in City Manager Smith.[14]

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liability doctrine since *Monell*); *see id.* at 474-77, 105 S.Ct. at 879-81 (Rehnquist, J., dissenting) (majority's analysis of procedural implications challenged).

[14] The City then pursues this analysis to claim that because the evidence clearly established that City Manager Smith could not

This contention fails for reasons earlier noted in Part II-A in our general discussion of municipal liability doctrine. If the agency and the city manager possessed exclusive authority in the critical matters here in issue, the evidence clearly established that it was only a paper, formal authority, never effectively exercised before Spell's injury to curb or countermand the authority in fact being exercised by Dixon and his subordinates in the police department. *See Bowen*, 669 F.2d at 989. As indicated in our earlier discussion, municipal liability may not be avoided by such purely formal reservations of "final" authority. The district court therefore did not err in submitting issues that disregarded the asserted reservation here and allowed the jury to infer that final authority in fact lay in others as the *de facto* municipal policymakers.

The second point is broader. It asserts that in the court's verdict submission and related instructions focussing on the culpability of particular defendant-officials, the court failed adequately to require that fault be traced directly to a policy or custom fairly attributable to the City as its own. In particular, the City asserts that the verdict form and related instructions permitted municipal liability to be imposed on the basis alone of findings of individual culpability of any of the named defendant-officials.

Analyzed in their totality and in light of the entire record, the instructions do not fail in this respect. The joinder of particular individuals as official-capacity defendants undoubtedly created an awkwardness for the

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be charged with establishing or condoning the allegedly culpable "policy or custom" (as the jury later found) and the Civil Service Commission was not named as a defendant, there was no evidence that any official or agency with policymaking authority had acted culpably in the critical respect necessary to establish municipal liability. This ultimate argument fails for reasons explained in text.

court in explaining their status as parties not exposed to liability but whose conduct was critical to the imposition of municipal liability. But we are satisfied that the court adequately worked through the awkwardness and in the process sufficiently communicated the relevant principles of "policy" and "policymaking authority" as essential elements of municipal liability.[15]

The court distinctly pointed out at the outset of its instructions on the municipal liability claim that the City might only be found liable if the "unconstitutional action of its employed[ ] . . . proximately resulted from . . . policies, customs or practices of the *defendant city*, or an *agency of the city*, such as in this case, the Fayetteville Police Department" (emphasis added). Shortly thereafter the court instructed in classic *Monell* terms the meaning of "municipal policy," pointing out that "policy" includes not only "official policy directives, regulations or ordinances" but "what the law considers de facto or

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[15] The district court explained to the jury that while it was to return verdicts respecting the culpability of each of the "representative" officials named as defendants, this would not result in individual liability on the part of any found culpable, but would impose liability "through them" on the City, and would also "specifically affix accountability."

It may be doubted that there is any technical basis for rendering the type of "merely declaratory" judgment against an official in his official capacity that the district court may have had in mind. Any error in this procedure was surely harmless however. In a properly structured municipal liability action naming only the City as defendant, it would of course be perfectly appropriate under Fed. R. Civ.P. 49 to require a special verdict designed to establish which, if any, of various municipal officials might have been policymakers whose culpability in establishing policy or condoning custom could then be legally attributed to the City. In fact, this was the legal effect accorded by the district court to the jury's answers to the special verdict submission. As indicated in text, there was ample evidence supporting the jury's determination that Chief of Police Dixon at least was a culpable policymaker whose culpability could fairly be attributed to the City "as its own."

in fact practices, customs or policies caused, maintained, tacitly encouraged or condoned by their supervisory personnel . . . even though these . . . have at no time received formal approval through the local government's decision making channels." Elsewhere the court had effectively instructed that "municipal policy or custom" as above defined could only be made by those "whose edicts, acts or omissions . . . may fairly be said to cause, maintain, tacitly encourage or condone the . . . policy, custom, practice or procedure of the . . . City." Such persons, the court indicated, were "representative" of the City in the sense that "policy or custom" created or condoned by them was that of the City in legal contemplation. Hence, it was clear that when the court used the term "representative defendant" in its instructions and verdict submission it was describing a defendant whom the jury must have found to have the requisite authority to establish or condone muncipal policy, i.e., to have final policymaking authority. The court's various indications that the conduct of such a "representative defendant" was attributable to the City was therefore a legally correct statement of the critical attribution principle rather than an erroneous negation of the "policy" and "policymaking authority" elements of municipal liability.

The City also challenges the adequacy of the jury's instructions on the causation element. The challenge is without merit.[16] The court effectively instructed the

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[16] It is not only without merit, but in one critical respect is positively disingenuous. In an obvious effort to bring the instructions here within those specifically disapproved in *Tuttle*, the City asserts in its brief that the district court instructed that the jury need only find that a proven policy or custom was "likely" or "might" lead to police misconduct such as that of McDaniel. Appellant's Brief p. 18; *cf. Tuttle*, 471 U.S. at 824 n. 8, 105 S.Ct. at 2436 n. 8. The instructions nowhere use that term nor convey any comparable notion that so tenuous an "affirmative link" between policy or custom and specific violation would suffice in proof.

jury at various points that in order to impose liability upon the City "through" the conduct of "one or more" of the "representative," i.e., policymaking, defendants, the jury must find that the conduct had established a policy or condoned a custom that "proximately" caused McDaniel to injure Spell. This was further elaborated by the court's explanation, drawing on related tort principles, that the culpable conduct of establishing policy or failing to "nullify" custom must be found to have "set in motion a series of acts by others which the representative defendant should have forseen would cause his subordinates, including defendant McDaniel, to in fact inflict constitutional injury upon . . . citizens." This was a completely adequate instruction, considered in total context of the records, to communicate the requirement that an "affirmative link" between policy or custom and specific violation be found.

Finally, the City challenges the court's instructions on the alternative theory of "condoned custom." Essentially, the complaint is that the court did not adequately explain that only a known, widespread "custom or usage" of unconstitutional conduct could be attributed, by condonation of policymaking officials, to the City. Specifically, the City points to a passage from the instructions in which the court instructed that "the citizens of a municipality do not have to endure an overly widespread or unduly prolonged pattern of past misconduct before municipal liability can be found." Again, we find no reversible error in this particular portion of the instructions.

The critical passage challenged simply followed up the court's immediately preceding instruction that what must be found was "a general and persistent pattern in practice . . . so common and well settled as to constitute a custom or pattern of official misconduct," which was then elaborated by the critical admonition that "a single isolated act is insufficient to establish a de facto policy." In this immediate context as well as in the more general context, this passage was therefore a quite acceptable

counterpoise, using the qualifiers "overly" and "unduly," to the basic proposition that only practices "general and persistent," "common and well settled," could constitute condoned custom or usage.

We therefore find no reversible error in the particular instructions sought to be challenged by the City.

For reasons deemed sufficiently important, we have reviewed the instructions more generally, following the rule in this circuit that despite the important strictures of Fed. R. Civ. P. 51, instructional error may be noticed in civil cases despite failures to make proper contemporaneous objection, when the error is "plain" or "fundamental." *See, e.g., Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1089 (4th Cir. 1985); *Miller v. Premier Corp.*, 608 F.2d 973, 983 (4th Cir. 1979). We are prepared to reverse on such a basis only when we can conclude that a particular jury instruction must necessarily have caused the jury to act in complete ignorance of, or to have misapplied, fundamentally controlling legal principles to the inevitable prejudice of an aggrieved party. Ordinarily, however, we will only disregard failures to object properly at trial if specific challenge is made, though belatedly, on appeal. Here, because of the complexity, and importance, and still evolving nature of the principles of municipal liability that control decision in this case, we have thought it appropriate to review *sua sponte* the instructions even more generally to determine if error that "fundamental" may have occurred. We conclude that it did not.

We are satisfied that the district court's instructions adequately informed the jury of the essential principles of both the "deficient training policy" theory and the related, alternative "condoned custom or usage" theory of municipal liability and appropriately submitted them as alternative legal/factual theories. In particular, we have considered whether the instructions imposed sufficiently stringent substantive standards at the critical points of

those alternative theories: identification of the specific policy or custom claimed to have caused the specific violation; fair attribution of the policy or custom and a requisite degree of fault to the City; establishment of a sufficiently close causal connection between policy or custom and specific violation.

The court's instructions adequately informed the jury that it must find that police training "policy" gave at least "tacit encouragement" to the specific misconduct—excessive use of force—charged to McDaniel, or, alternatively, that there had developed a "well settled" custom or practice which included such misconduct. The instructions then required that such a specifically deficient training policy should have been established, or a specifically inclusive custom should have been knowingly condoned by "representatives" of the City duly authorized to establish policy, or to condone developed practices. The instructions required that the establishment of deficient training policy or condonation of culpable custom should be traceable to the "gross negligence" or "deliberate indifference" of those authorized and responsible to act for the City. Finally, as earlier indicated, the instructions properly required a finding of sufficiently close connection between policy or custom and specific violation.

Stepping back somewhat from the conceptual complexities and difficulties of evolving municipal liability doctrine and assessing the overall thrust of the court's instructions in practical terms, we have no doubt that the essentials of the doctrine as it now stands were accurately conveyed. The jury was sufficiently informed that it could only impose liability on the City if it was persuaded that law enforcement officials to whom the City had effectively delegated authority to act for it in the policy matter of training and supervising its police had either intentionally or by gross negligence or deliberate indifference so mis-trained them or failed to supervise them, or both, that the police had been given reasonably

to believe that they were generally free to use excessive force in any police-citizen encounters without fear of sanction, and that as a direct result of this informal "policy or custom" McDaniel had unjustifiably assaulted Spell. That suffices to uphold the instructions against both specific challenges by the City and *sua sponte* review by the court undertaken to protect against fundamental injustices in application of an evolving body of legal doctrine.

III

The City has made several other assignments of trial error. We have considered each of them and find none with merit. Only three warrant even limited discussion.

The first challenges the district court's order of a new trial confined to damages alone, following the first jury's return of a verdict finding liability against both McDaniel and the City but awarding Spell only $1,000 in compensatory damages.

The City does not seriously challenge—nor could it—the court's determination that the award was inadequate, but asserts that if new trial was warranted it should have been on all issues. We disagree.

The decision was a discretionary one, and it lay well within the bounds of informed discretion. Indeed, to have proceeded otherwise may well have been an abuse of discretion here. The controlling legal principle of course is that in such situations a new trial on all issues is indicated if the verdict "could *only* have been a sympathy or compromise verdict . . . [b]ut where there is no *substantial* indication that the liability and damage issues are inextricably interwoven . . . a second trial limited to damages is entirely proper." *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 511 F.2d 839, 846 (4th Cir.1975) (emphasis added). This principle simply reflects the common sense proposition that a verdict this manifestly inadequate to compensate for undis-

puted physical and economic harm is practically bound to reflect one of two things; either a compromise reflecting a jury's desire to give at least a little something to an attractive claimant despite serious reservations or outright doubt, about the proof of defendant's culpability; or an unwillingness adequately to compensate an unattractive claimant despite overwhelming proof of culpability. Whether a particular verdict reflects the one or the other is quintessentially a decision committed to the informed discretion of the judge who has conducted the trial and can best estimate the relative possibilities. Here, the record completely supports the district court's assessment of the proper course.

In a related assignment of error, the City contends that the district court abused its discretion in declining to set aside the second jury's compensatory award of $900,000 as excessive. Here again, of course, the district court's ruling is a discretionary one, and indeed is one that we review with even more than ordinary deference. *See Grunenthal v. Long Island Rail Road Co.*, 393 U.S. 156, 160, 89 S.Ct. 331, 334, 21 L.Ed.2d 309 (1968) (only to determine if "untoward, inordinate, unreasonable or outrageous"); *Simmons v. Avisco, Local 713, Textile Workers Union*, 350 F.2d 1012, 1020 (4th Cir.1965) (only to determine whether "not merely excessive but 'monstrous' ").

Under this standard we cannot find error in the district court's ruling; indeed it seems to us eminently sound. Although Spell's medical expenses were relatively low ($2,041), his hospital stay short (four days), and his ability to function sexually not permanently impaired, the evidence showed that the assault caused him intense pain, that his damaged testicle enlarged five to seven times its normal size as a result, that it was like "a smashed piece of fruit" with the outer covering torn and the internal contents passing through the tear, that surgical removal of the testicle led to permanent disfigure-

ment and that, on account of an earlier illness, the assault left Spell irreversibly sterile.

Finally, the City argues that the district court erred in admitting evidence of the City's settlement of an earlier police brutality action brought by another party, and in admitting evidence of arrest quotas and of sexual discrimination and harassment within the police department towards arrestees and trainees.

The first item of evidence was properly admitted to show, as an essential element of Spell's "condoned custom" theory of liability, that the City was sufficiently aware of the existence of a developed practice or custom of such conduct. Its relevance substantially outweighed any risk of unfair prejudice within contemplation of Fed. R. Evid. 403, a conclusion bolstered by the fact that the court gave a limiting instruction which properly confined jury consideration to this purpose.

The second type of evidence may have lain at the margins of relevance and unfair prejudice, but we are satisfied that its admission was not an abuse of discretion, certainly not error requiring reversal on this record.

In his complaint Spell specifically alleged that the defendants "did establish and enforce quota systems for arrests and citations to encourage arrest and detention of citizens without regard for due process of law and probable cause" and "did foster and encourage an atmosphere of lawlessness, anarchy [and] repression . . ." which reflected the policies or customs of the City of Fayetteville, and which resulted in the injury inflicted by McDaniel. Although, as defendants contend, "this case concerns an alleged assault by a white male police officer upon a white male arrestee," in its *Monell* dimensions, Spell's complaint raised the larger issue of police department customs of authorizing or condoning the use of excessive force against arrestees. The issue of municipal liability as framed by Spell's complaint involved a broad inquiry into the training, supervision, investigation, and discipline

of police officers. Evidence of the existence of arrest quotas, and discriminatory attitudes and practices which, according to Spell, fostered an atmosphere of aggressive and lawless behavior and compromised the uniformity and quality of police department training and supervision, thus bore directly upon the question of municipal liability for the assault on Spell. As the district court concluded, "evidence of defendants' misconduct lay at the heart of plaintiff's complaint. It was not introduced to prove defendants' character, rather it was introduced and admitted as substantive evidence in support of the *Monnell* [sic] allegations in plaintiff's complaint." *Spell v. McDaniel*, 604 F.Supp. at 649. We agree with this assessment.

IV

The City's final assignment of error is to the district court's award of attorney fees to plaintiff as a prevailing party under 42 U.S.C. § 1988.

The court awarded Spell a total of $325,303.75 in attorney fees representing 1.964.5 hours billable at rates ranging from $100-125 per hour. A lodestar of $224,758.50 was enhanced by a "contingency" adjustment or "multiplied" of 1.5 to compensate Spell's counsel for the initial risk of not prevailing and thus not collecting a fee. *See Spell v. McDaniel*, 616 F.Supp. 1069, 1107-10 (E.D.N.C. 1985). The defendants contend that the district court erred by including within the lodestar amount hours spent by Spell's attorneys on "non-legal" tasks such as serving subpoenas, photocopying documents, and filing pleadings; by allowing the $100-125 hourly rates requested by Spell's counsel despite their failure to offer evidence of their customary rates; by setting hourly rates of $100 for attorneys Holt and Richardson although each had less than five year's trial experience when this litigation commenced; by applying uniform rates to all services rendered regardless of the nature of the work performed; and by *presuming* the propriety of a contingency adjustment in § 1988 cases.

A

An allowance of attorney's fees by a district court, which has "close and intimate knowledge of the efforts expended and the value of the services rendered, must not be overturned unless it is 'clearly wrong.'" *McManama v. Lukhard*, 616 F.2d 727, 729 (4th Cir. 1980) (*quoting Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978)) (*citing Lea* v. *Cone Mills Corp.*, 467 F.2d 277, 279 (4th Cir. 1972) (*quoting United States v. Anglin & Stevenson*, 145 F.2d 622, 630 (10th Cir. 1944))). Applying this standard to the careful analysis of the district court, we conclude that the defendants' contentions are without merit except as to the court's inclusion of a "contingency multiplier."

B

With respect to its inclusion within the lodestar amount of hours spent by Spell's counsel on "non-legal" tasks, the district court observed that the defendants' argument was "predicated on the erroneous assumption that a single, correct staffing pattern exists within every law firm for every lawsuit." 616 F.Supp at 1096. Rather, as the court found, in some circumstances, it may be more efficient and reasonable for counsel to perform such tasks. Thus, for example, Spell's attorneys provided affidavits indicating that in many cases their service of subpoenas was accompanied by a final interview with witnesses; that personal service was often of particular importance because many of Spell's witnesses required constant reassurance; and that while photocopying documents, they screened, reviewed and arranged more than 14,000 pages of police department internal reports, "perhaps the most important time spent on this case by plaintiff's counsel." *Id.* at 1096-97. As a precautionary measure, the court nevertheless deducted ten hours from those requested

"[t]o the extent secretaries could have been competently employed to perform some of this work." *Id.* at 1097.[17]

The § 1988 fee applicant bears the burden of establishing the reasonableness of the hourly rates requested. Specifically, the applicant must produce specific evidence of the "prevailing market rates in the relevant community" for the type of work for which he seeks an award. *Blum v. Stenson*, 465 U.S. 886, 895-96 & n. 11, 104 S.Ct. 1541, 1547 & n. 11, 79 L.Ed.2d 891 (1984); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C.Cir.1982). The prevailing market rate may be established through affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market. *National Association of Concerned Veterans*, 675 F.2d at 1325-26; *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983).

The district court acknowledged that Spell's counsel had "barely" made the required showing. Because they omitted information regarding their own billing practices and provided only a few generalized affidavits from local counsel, the district court was required to "substitute its personal knowledge and experiences in lieu

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[17] In response to the defendants' related objection that the hours recorded by Spell's counsel reflected some duplication of effort, the court found that no evidence had been proffered which showed that duplicated time was unreasonable or unnecessary but nevertheless "employ[ed] a 5% across-the-board reduction in counsel's requested . . . hours in order to eliminate any unreasonable duplication that might have been overlooked, errors committed by this Court in denying defendants' excessive hours objections . . . and as a 'practical means of trimming any fat from [plaintiff's] fee petition.'" 616 F.Supp. at 1094-95, *partially quoting New York State Association for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983).

of substantive evidence to a greater degree than it would have hoped." 616 F.Supp. at 1102. The court noted, however, that the defendants did not object to the rates requested, and that the factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974), which were embraced by this court in *Barber*, 577 F.2d at 226 [18] militate strongly in favor of compensating Spell's counsel at the rates sought. Among other things, the court found that the litigation presented challenging issues of both fact and law of considerable complexity and magnitude; that Spell's counsel incurred substantial opportunity costs in pursuing the litigation, given the drain of resources on their four-person firm and the unpopularity of their case within the community; and that the rates requested were in line with other awards in recent years in similar cases.[19] 616 F.Supp. at 1103-05. Although, as the district court observed, the rates allowed were at the "apogee of the range of rates that prevail in this district for lawyers of comparable qualifications and experience who handle cases of this sort," *id.* at 1105, we cannot say that they were "clearly wrong."

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[18] This court has summarized the *Johnson* factors to include: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undersirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Barber* 577 F.2d at 226 n. 28.

[19] Although the court was unaware of any award of fees in a complex civil rights case within the district court in the last two years, Spell's counsel provided four affidavits from members of the Raleigh and Fayetteville Bars indicating that in similar cases they, or their colleagues, would charge the same rates as those requested. 616 F.Supp. at 105.

Nor can we say that the district court abused its discretion in allowing attorneys Holt and Richardson to charge their time at $100 per hour although each had less than five year's trial experience when this litigation commenced. Counsel's experience is only one of many factors to be considered in determining a reasonable fee. *See Johnson*, 488 F.2d 714.

As to the district court's application of uniform rates to all services rendered by Spell's counsel without regard to the nature of the work performed, we likewise cannot say that the result was "clearly wrong." As the district court noted, the lower courts have adopted varying approaches to the problem of valuing legal services, with some utilizing different rates for different types of work, particularly in-court and out-of-court or primary and secondary services, *see e.g.*, *Whitley v. Seibel*, 676 F.2d 245, 253-54 (7th Cir.1982); *Miles v. Sampson*, 675 F.2d 5, 9 (1st Cir.1982); *United Nuclear Corp. v. Cannon*, 564 F.Supp. 581, 589 (D.R.I.1983); *Langdon v. Drew Municipal Separate School District*, 512 F.Supp. 1131, 1139 (N.D.Miss.1981), and others applying uniform rates for all services rendered, *White v. City of Richmond*, 713 F.2d 458, 461 (9th Cir.1983); *Maceira v. Pagan*, 698 F.2d 38, 40-41 (1st Cir.1983); *Bonner v. Coughlin*, 657 F.2d 931, 937 (7th Cir.1981). The district court applied flat rates in this case consistent with its own previous awards and with those of other judges within the district. 616 F.Supp. at 1103. The court found, moreover, that Spell's "counsel's knowledge, skills and abilities were as fully engaged in their out-of-court work as they were in-court." *Id.*

We therefore find no error in the district court's determination of the "lodestar fee."

C

As indicated, the district court, having computed the "lodestar" fee figure, then enhanced it by a 50% "multiplier," expressly to compensate counsel for the risk of not

prevailing and therefore being paid nothing under their contingency fee contract.[20] Defendants challenge this primarily on the basis that the district court acted on a "presumption" of entitlement to a contingency multiplier rather than by a careful exercise of its discretion.

We disagree with this specific basis of challenge. The district court properly recognized that the "presumption" ran the other way: that the lodestar figure presumptively represented a reasonable fee, with the burden on the fee claimant to establish the propriety of an upward contingency adjustment. *See* 616 F.Supp. at 1107 n.59. Based upon this understanding the district court indeed undertook an extended, meticulous analysis of those factors it considered relevant to the use of a contingency multiplier under then controlling legal precedent. Noting that the general propriety of contingency multipliers had been expressly reserved by the Supreme Court, *see* 616 F.Supp. at 1107 (citing *Blum v. Stenson*, 465 U.S. at 901 n.17, 104 S.Ct. at 1550 n.17(, the court relied for its allowance of a multiplier on a number of lower federal court decisions which had assumed their general propriety. *See* 616 F.Supp. at 1108-10.[21]

It would be difficult to fault the district court's factual and legal analysis under the principles it understandably thought at the time controlled its discretionary allowance of the contingency multiplier. But the Supreme Court has in the interval now spoken to the question reserved in *Blum*, and in a way that we conclude makes a contingency multiplier inappropriate here as a matter of law.

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[20] The court expressly declined to make a further upward "quality adjustment," 616 F.Supp. at 1110-11. This ruling is not challenged on appeal.

[21] Among the decisions relied upon was that of another district court of this circuit which was later affirmed by this court, *see Vaughns v. Board of Education*, 770 F.2d 1244, 1246 (4th Cir. 1985). The district court's allowance of a multiplier was therefore well within contemplation of emerging circuit law at the time.

In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, —— U.S. ——, 107 S.St. 3078, 97 L.Ed. 2d 585 (1987), a 5-4 majority of the Court held that a contingency multiplier may be permissible in appropriate cases,[22] though another 5-4 majority thought the multiplier use in the case before it not warranted.

Within the divided *Delaware Valley* Court, Justice O'Connor's position in concurrence controls on the circumstances in which a contingency multiplier may ever be allowable.[23] Critical to that concurring position as it

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[22] The fee award at issue in *Delaware Valley* was made under § 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d), but the Court's decision plainly applies as well to awards under 42 U.S.C. § 1988. *See Delaware Valley*, —— U.S. at ——, 107 S.Ct. at 3085-86 (plurality opinion).

[23] Justice White, writing for four Justices, being "unconvinced that Congress intended the risk of losing a lawsuit to be an independent basis for increasing the amount of any otherwise reasonable fee," *Delaware Valley*, —— U.S. at ——, 107 S.Ct. at 3086 (plurality opinion), concluded in a plurality opinion that "multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss to impermissible under the usual fee-shifting statutes," *id.* at ——, 107 S.Ct. at 3088. Lacking a majority for this *per se* position, Justice White then concluded that even if contingency multipliers were permissible under the "typical fee-shifting statutes," they should only be allowed in "exceptional cases," and that on the facts of the particular case no enhancement was warranted. *Id.* at ——, 107 S.Ct. at 3087-90. Four Justices, for whom Justice Blackmun wrote in dissent, disagreed, believing that fee enhancement for the risks of nonpayment was permissible in appropriate cases, and that remand for further fact findings would establish whether the case at issue was an appropriate one. *Id.* at ——, 107 S.Ct. at 3091-3102 (Blackmun, J., dissenting). Justice O'Connor, writing separately, agreed with the dissenting Justices that Congress did not intend flatly to foreclose all consideration of contingency in setting reasonable fees under such fee-shifting statutes as 42 U.S.C. § 1988. But she agreed with the other four justices that a "risk multiplier" was not warranted in the circumstances of the case before the Court, *id.* at ——, 107 S.Ct. 3089-92 thereby providing a majority for re-

affects the instant case are the propositions that (1) "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market,' " this being the basic purpose of § 1988, *id* at ——, 107 S.Ct. at 3089-92; and (2) no enhancement for risk should be allowed on the basis of " 'legal' risks or risks peculiar to the case" since these risks are adequately taken into account in fixing the "lodestar" figure, *id.* at ——, 107 S.Ct. at 3091.

Specifically applying those constraints, Justice O'Connor provided the majority necessary to reverse allowance of the multiplier that it was inappropriate on the facts of the case even if not generally inappropriate. This majority emphasized that there was no finding of record that an enhancement for risk was necessary in the relevant market to insure that "poor clients with good claims [could] secure competent help," *id.* at ——, 107 S.Ct. at 3089; and that the lower courts had instead found enhancement appropriate on the impermissible basis of the legal and practical risks perculiar to the particular case, rather than on the basis of an general difference in relevant market treatment of all comparable contingent fee cases, *id.* at ——, 107 S.Ct. at 3089-92.

We conclude that these same critical constraints make the allowance of a contingency multiplier inappropriate in the instant case.

Though the district court noted, and we can assume, that the case was an "unpopular" one in the community, there is no finding of record that a contingency enhancement was necessary to insure that competent counsel would nevertheless be willing to undertake contingency

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versal. Justice O'Connor's position on the circumstances under which a "contingency multiplier" may be appropriate is therefore the pivotal one.

representation in such cases. More critically, we think that the record strongly suggests, if it does not compel, a directly opposite conclusion. In its lodestar analysis, the district court alluded to the fact that "there are a number of pending lawsuits in federal court against the [police department] and the City," and that plaintiff's counsels' time spent in conference with other counsel in those cases was for that reason practically justifiable. 616 F.Supp. 1099. From this we think it obvious that plaintiff here could not possibly show that "without risk-enhancement, plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market," *id.* —— U.S. at ——, 107 S.Ct. at 3089 (plurality opinion). The picture that emerges from the entire record is instead that these counsel and others in related cases had no general reluctance to undertake contingency representation in this type case notwithstanding any general "unpopularity" they might have among the local lay populace. Indeed, it would appear that there was no dearth of competent counsel willing to take this and comparable cases on a contingency basis as being "good plaintiffs' cases" without any guarantee of special enhancement of reasonable "lodestar" fees.

Furthermore, here as did the lower courts in *Delaware Valley*, the district court essentially justified its allowance of a multiplier on the peculiar risks, complexities, and difficulties of the instant case rather than on any perception that enhancement was required to insure adequate representation in the run of like contingency fee cases. *See* 616 F.Supp. 1107-10. Specifically, the court, relying essentially on the mode of analysis followed by the Third Circuit in its pre-*Blum* decision in *Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir.1976), looked primarily at the case-specific "burden" on the plaintiff in terms of the case's complexity, dubiety of success on the merits, and difficulty of proving damages; the case-specific practical risks of

uncompensated time and expense assumed by counsel in undertaking representation; and the delay in receiving payment, *see* 161 F.Supp. at 1107-10. As we read *Delaware Valley*, a majority of the Supreme Court considered that these case-specific risk factors may not properly be drawn upon to enhance a "lodestar" fee with a "contingency multiplier." *See Delaware Valley*, —— U.S. at ——-——, 107 S.Ct. at 3079-87 (plurality opinion); *id.* at ——, 107 S.Ct. at 3089 (concurring opinion).

Accordingly, we conclude that the "contingency multiplier" allowed in this case is not legally justified, and must be excised from the total fee award.

V

We therefore affirm the judgment against McDaniel and the City on the merits, and we vacate the district court's order awarding costs and attorney fees for modification in conformity with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

UNITED STATES DISTRICT COURT
E.D. NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 84-06-CIV-3

HENRY Z. SPELL,

Plaintiff,

v.

CHARLES D. MCDANIEL, Ind. & as patrolman, City of Fayetteville Police Department; WILLIAM P. DALTON, Command Sergeant, City of Fayetteville Police Department; ROBERT T. HOLMAN, Command Sergeant, City of Fayetteville Police Department; WILLIAM C. JOHNSON, Director of Internal Affairs Division, City of Fayetteville Police Department; DANIEL K. DIXON, Chief, City of Fayetteville Police Department; JOHN P. SMITH, City Manager, City of Fayetteville; and the CITY OF FAYETTEVILLE, N.C., a municipal corporation,

Defendants.

April 17, 1985

ORDER

JAMES C. FOX, District Judge.

On April 4, 1985, the second jury returned its verdict in this action, assessing compensatory damages against defendants McDaniel, Dalton, Holman, Dixon, Johnson, and through the official supervisory defendants, the City

of Fayetteville, in the amount of $900,000. As a result of the jury's verdict, defendants have filed post-trial motions for (1) judgment notwithstanding the verdict and (2) amendment of judgment or, alternatively, a new trial. Plaintiff has responded, thus, these matters are now ripe for disposition and will be addressed *seriatim.*

A. *Defendants' Motion for Judgment Notwithstanding the Verdict.*

Defendants move for judgment notwithstanding the verdict pursuant to F.R.Civ.P. 50(b), arguing there was no evidence to support a finding of $900,000 compensatory damages. Defendants moved for a directed verdict at trial, which was denied, and since Rule 50(b) simply allows a party to renew his motion for a directed verdict, defendants' motion now requires that the evidence be reexamined to determine whether the court's prior ruling was correct.

The standard for granting a judgment notwithstanding the verdict is the same as the standard governing the direction of a verdict. *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 13 (9th Cir.1973); *cert. denied*, 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1973); *O'Neill v. W.R. Grace & Co.*, 410 F.2d 908 (5th Cir. 1969). A motion for judgment notwithstanding the verdict presents a question of law as to whether or not, when all of the evidence is considered, together with all reasonable inferences therefrom in favor of the opposing party, there exists a failure or lack of evidence to prove any necessary element of the party favored by the verdict's case. *Ries v. Sanders*, 34 F.R.D. 468, 470 (N.D. Miss.1964). In reviewing the evidence, the court may not weigh the evidence or the credibility of any witness. *Singer Co. v. E.I. duPont de Nemours & Co.*, 579 F.2d 433 (8th Cir.1978). Essentially, a trial court may only grant a judgment notwithstanding the verdict "when the evidence points all one way and is susceptible to no rea-

sonable inferences sustaining the position of the non-moving party." *Id.* at 441; 5A *Moore's Federal Practice* § 50.07(2).

Defendants specifically contend that (1) no evidence was presented of plaintiff's "mental anguish" so as to support the instruction given by the court allowing the jury to consider "mental anguish" as an element of damages and (2) the evidence of Spell's pain and suffering was "at best, equally supportive of the fact that plaintiff had no pain and suffering." Defendants' April 11, 1985, Memorandum at 2.

Reversing the order of defendants' arguments the court finds no merit in defendants' assertion regarding plaintiff's pain and suffering. Plaintiff presented three (3) witnesses at trial, including plaintiff's treating physician and his former attorney, along with fourteen (14) documents, all tending to prove plaintiff's intense pain and suffering, which increased as his testicular sac swelled. The testimony of Doctors Rochman and Proctor and the reasonable inferences derived therefrom clearly buttressed plaintiff's theory of damages. To suggest that plaintiff simply suffered "mild discomfort" after the McDaniel assault is to disregard the reality of plaintiff's injury. *See, e.g.*, plaintiff's Exhibits 7, 8, 9a, 11B and 12.[1]

Defendants' argument concerning the "mental anguish" element of damages[2] is predicated on the fact that plaintiff did not testify at the second trial. Defendants con-

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[1] No evidentiary objections were tendered to these exhibits at the pre-trial hearing before Magistrate Dixon or in the Pre-Trial Order signed by counsel.

[2] As one of six (6) elements of damages, the court instructed the jury to take into account any "pain, suffering and mental anguish" suffered by the plaintiff as found by a preponderance of the evidence. Jury Instructions at 16-18. The other five elements were: (1) medical expenses; (2) scars and disfigurement; (3) loss of part of the body and loss of use of part of the body; (4) permanent injuries and disability; and (5) violation of constitutional rights.

tend that Spell's failure to testify created, *ipso facto*, a lack of evidence of mental anguish. The court disagrees with defendants' logic.

Plaintiff suffered a brutal and extremely traumatic injury. From the nature and extent of the injury alone, a rupture of plaintiff's right testicle, mental anguish associated with plaintiff's pain and suffering could readily be inferred by the jury. *See Baskin v. Parker*, 602 F.2d 1205, 1209-1210 (5th Cir.1979). However, the circumstances under which the blow was inflicted which caused the injury were also extraordinary. The second jury was instructed that plaintiff was handcuffed in the basement of the LEC and, while in that position, was assaulted by defendant McDaniel, without justification, resulting in serious and permanent bodily injury. Further, the jury learned that plaintiff remained confined in the Cumberland County jail for three days as his pain and suffering increased. Thus, not only could the jury infer mental anguish from the rupture, but they could also reasonably infer mental anguish or emotional distress from the unusual circumstances surrounding the delivery of the injury and its aftermath.

Further support for any award by the jury as to mental anguish can be based upon Spell's permanent loss of his right testicle and resulting irreversible sterility. Although mental anguish might have been more easily demonstrated through direct testimony by the plaintiff, it could also be reasonably inferred by the jury from all of the above circumstances. *See Halperin v. Kissinger*, 606 F.2d 1192, 1207-1208 (D.C. Cir.1979).

In conclusion, the evidence in support of plaintiff's allegations, taken in a light most favorable to the plaintiff, was substantial. The jury's verdict on the issue of compensatory damages was fully supported by the anecdotal and documentary evidence at trial and was clearly reasonable. *See infra* at 1419-1420. Accordingly, defendants' motions for judgment notwithstanding the verdict if DENIED.

B. *Defendants' Motion for Amendment of Judgment of a New Trial*

In the alternative, defendants have moved for amendment of the judgment and for a new trial, pursuant to F.R.Civ.P. 59, on the grounds that (1) the verdict is against the substantial or clear weight of the evidence; (2) it would be unjust for the defendants to be required to pay the verdict in light of the lack of evidence supporting the verdict; and (3) the court erred in restricting defendants in their prospective cross-examination of the plaintiff by preliminarily barring evidence of plaintiff's prior trafficking convictions. If defendants called plaintiff as a hostile witness, unless plaintiff embellished his prior deposition or trial testimony.[3]

F.R. Civ. P. 59(a) requires that the trial court set aside the verdict and order a new trial, even if the verdict is supported by substantial evidence, if the verdict is: (1) against the clear weight of the evidence; or (2) based on false evidence; or (3) will result in a miscarriage of justice. *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d at 891. The trial court is not required to take that view of the evidence most favorable to the verdict winner. Indeed, the court is required to weigh the evidence for itself.

Defendants having made the motion for a new trial, the court is obligated to briefly weigh the evidence and assess the credibility of the key witnesses at trial. The court, having listened intently to all the testimony at trial and having carefully reviewed its trial notes, finds

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[3] The court will address all of defendants' arguments as part of their motion for a new trial pursuant to F.R.Civ.P. 59(a). Defendants' motion for amendment of judgment under F.R.Civ.P. 59(e) is inapposite as that subdivision exists solely to address situations such as that arising in *Boaz v. Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944).

the evidence in support of the jury's verdict substantial and further holds that allowing the $900,000 verdict to stand will not result in a miscarriage of justice.

Plaintiff's initial physical condition on the night of November 19, 1983, and on November 20, 1983, was established by plaintiff's Exhibits 6, 7, 8, 9A, 9B and 9C, all of which were admitted without objection. These jail and emergency room reports indicate "intense pain" and extreme swelling of plaintiff's right testicle within approximately twenty-four hours of the McDaniel assault.

Dr. Stephen Rochman, plaintiff's treating physician testified, as he did at the first trial, that plaintiff's testicular sac was swollen over five times its normal size, due to the rupture of the right testicle and the accompanying blood and clotting. Such an injury, he testified, was bound to cause significant pain. As Dr. Rochman's reports indicate, plaintiff suffered a "traumatic rupture of the right testicle and hematocele." Plaintiff's Exhibit 11B. "The testicular parenchyma was seen lying fragmented and in pieces within the tunica vaginalis. There was a laceration through the tunica albuginea of the testicle throughout its whole length. . . . There was no way to salvage the testicle." Plaintiff's Exhigit 11A. Dr. Rochman's testimony and his medical records established the severity of plaintiff's injury, the pain and suffering associated with it, and the need for immediate surgery resulting in the loss of part of plaintiff's body.

Dr. Lee Proctor, a pathologist who examined the removed right testicle of the plaintiff, testified that plaintiff's testicle was crushed much the way a fruit is crushed when it is squeezed and that the remains of plaintiff' testicle were spread throughout his testicular sac. Again, this testimony clearly supported plaintiff's claims of pain, suffering, mental anguish, loss of part of the body and permanent injury.

The testimony of Paul Herzog, plaintiff's attorney for his criminal charges, clearly indicated that two days following the assault, plaintiff was unable to walk in a normal fashion due to the excessive swelling of the testicular sac, and, further, that Spell was pale, unable to talk and appeared to be in a great deal of pain. The court finds the testimony of plaintiff's professional witnesses to have been credible. Defendants failed to rebut any of this testimony with evidence in their own case-in-chief or by effective cross-examination of plaintiff's witnesses.

Evidence with regard to plaintiff's medical expenses is found in plaintiff's Exhibits 1-3. Evidence as to scarring and disfigurement, as well as loss of part of the body, stems from the surgical removal of the testicle itself. Evidence as to loss of the use of part of the body is likewise predicated on the permanent loss of plaintiff's right testicle and his permanent irreversible sterility. Finally, the violation of plaintiff's constitutional rights was established by the first jury's verdict and to the extent the second jury's overall verdict reflects an independent award for that violation, such an award is just and proper. *See e.g., Bauer v. Norris*, 713 F.2d 408, 413-414 (8th Cir. 1983); *Green v. Francis*, 705 F.2d 846, 848-850 (6th Cir. 1983); *Lenard v. Argento*, 699 F.2d 874, 888-889 (7th Cir. 1983); *Herrera v. Valentine*, 653 F.2d 1220, 1222 (8th Cir. 1981).

The amount of time in which the jury deliberated was reasonable (2 hours 41 minutes) and the question posed to the court by the jury on the morning of April 4, 1985, clearly indicated a thoughtful and balanced consideration of all the elements of damages as set forth in the court's instructions.[4] Based on the aforesaid, the court concludes

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[4] The jury's question read as follows:

> Should we, as the jury, list the damages in 5 categories for clarification as to how damages were awarded.

the jury's verdict on compensatory damages was not against the weight of the evidence and, in fact, was amply supported by the evidence and the prior jury's findings of liability; to-wit, plaintiff's permanent loss of his right testicle, permanent irreversible sterility and violation of his constitutional rights. The award of $900,000 was not "grossly excessive, inordinate, shocking to the judicial conscience, . . . or monstrous." *Wilson v. Taylor*, 733 F.2d 1539, 1548 (11th Cir. 1984). Defendants' motion for a new trial on the basis that the verdict was against the weight of the evidence or was without foundation and based on speculation is, therefore, DENIED.

Defendants have also moved for a new trial contending the court erroneously restricted defendants' potential cross-examination of the plaintiff as a hostile witness.[5] At a pre-trial hearing ordered by this court to dispose of all foreseeable evidentiary issues and to settle a final pre-trial order, Magistrate Dixon granted plaintiff's motion *in liminine* to exclude all evidence of plaintiff's prior convictions. On appeal, this court reversed the Magistrate, holding that application of the balancing test set forth in F.R. Evid. 403 led to the conclusion that the probative value of the evidence of plaintiff's prior convictions, as those convictions related to plaintiff's credibility as a witness, was not substantially outweighed by the danger of unfair prejudice. Order of April 1, 1985, at 2.

At a pre-trial meeting in chambers on the morning of trial, counsel for plaintiff indicated that they would not

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[5] F.R.Civ.P. 59(a) further allows a motion for a new trial on the basis that substantial errors were committed at trial in the admission or rejection of evidence on the giving or refusal of instructions. *Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357, 381 (E.D.Pa. 1982); *Diane Manufacturing Co. v. Sheffield Industries*, 514 F.Supp. 185, 186 (S.D.Fla. 1981).

call plaintiff to testify.[6] Defendants then suggested they might call plaintiff as a hostile witness and requested the court render a *preliminary advisory* ruling before the start of trial as to whether defendants would be allowed to impeach plaintiff with his prior narcotics trafficking convictions.[7] After extensive discussion with counsel, the court informed the parties that its inclination would be to bar evidence of plaintiff's prior trafficking convictions unless he embellished his prior deposition or trial testimony, should plaintiff choose not to testify in his case-in-chief, thereby not placing his credibility in issue, but instead be called by defendants as an adverse witness (applying the balancing test of F.R. Evid. 403 and finding the balance, under these circumstances, tipping slightly to the side of the plaintiff).

Based on this *preliminary* discussion, counsel chose not to call the plaintiff to the stand. Having made this tactical decision, any complaint defendants had with regard to the court's preliminary, advisory ruling in chambers was rendered moot. *Luce v. United States*, —— U.S. ——, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). In *Luce*, the petitioner moved at trial to exclude the government from using a prior state conviction to impeach him if he testified. The District Court denied Luce's motion *in limine*, ruling that the prior conviction constituted permissible impeachment under F.R. Evid. 609(a). Luce chose not to testify at trial and was convicted.

On appeal, petitioner argued the District Court abused its discretion in denying the motion *in limine*. The Sixth Circuit Court of Appeals affirmed, stating that where the

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[6] This pre-trial, in chambers conference was not on the record.

[7] Counsel were cognizant of the fact that under any circumstances, plaintiff's conviction stemming from the charges of November 19, 1983, was fully admissible. In fact, the jury received evidence to that effect.

defendant fails to testify, the appellate court would not review the District Court's *in limine* ruling. The Supreme Court granted certiorari and affirmed the Sixth Circuit.

In *Luce*, the Court held that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify. To perform the balancing required by F.R.Evid. 609(a), a reviewing court must know the precise nature of the defendant's testimony, which is unknowable when the defendant fails to testify. Under these circumstances, the court said "[a]ny possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative." *Id.* at 463.

The reason for such a rule is obvious. It enables the reviewing court to determine the impact any erroneous impeachment may have had in the context of the entire trial and also tends to discourage motions made solely to "plant" reversible error in the trial. *Id.* at 464. This court finds the rationale and rule of *Luce* equally applicable to the situation in the case at bar.

First, because defendants did not call plaintiff as a hostile witness, the court was never required to formally rule on plaintiff's motion *in limine* in that context. All that was rendered in chambers was a preliminary, advisory ruling. This cannot form the predicate for error.

Second, as in *Luce*, any possible harm to the defendants is purely conjectural and speculative. The advisory ruling, by its own words, was subject to change as plaintiff's testimony unfolded, and defendants would have been allowed to impeach the plaintiff with his trafficking convictions had his trial testimony, in any manner, differed from his prior testimony. *See id.* at 463. In addition, the court was free, at anytime, in the exercise of its sound judicial discretion, to alter its preliminary ruling. *Id.* By deciding not to call the plaintiff to testify, the court was given no opportunity to exercise such discretion.

Accordingly, defendants' motion for a new trial based on the court's advisory pre-trial ruling regarding evidence of plaintiff's prior convictions is DENIED.[8]

Finally, with regard to defendants' motion for remittitur, this court has held that the verdict was neither against the weight of the evidence nor excessive as a matter of law. The court is not free to set aside the verdict merely because it might have awarded a slightly different amount of damages nor may the court arbitrarily reduce plaintiff's award of damages, even if it were inclined to do so. Given the evidence at trial and the prior jury's findings of liability, the second jury's award of $900,000 as compensatory damages fails to shock the conscience of the court. The verdict was not unreasonably high. Therefore, defendants' motion for remittitur is DENIED.

SO ORDERED.

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[8] Even if *Luce* was not decisive, the court finds the advisory ruling was correct and in accordance with law, given the information at the court's disposal when the issue was discussed. *See Moore v. Volkswagenwerk, A.G.*, 575 F.Supp. 919 (D.Md. 1983).

UNITED STATES DISTRICT COURT
E.D. NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 84-06-CIV-3

HENRY Z. SPELL,

Plaintiff,

v.

CHARLES D. MCDANIEL, Ind. & as patrolman, City of Fayetteville Police Department; WILLIAM P. DALTON, Command Sergeant, City of Fayetteville Police Department; ROBERT T. HOLMAN, Command Sergeant, City of Fayetteville Police Department; WILLIAM C. JOHNSON, Director of Internal Affairs Division, City of Fayetteville Police Department; DANIEL K. DIXON, Chief, City of Fayetteville Police Department; JOHN P. SMITH, City Manager, City of Fayetteville; and the CITY OF FAYETTEVILLE, N.C., a municipal corporation,

Defendants.

March 12, 1985

ORDER

JAMES C. FOX, District Judge.

On February 20, 1985, the jury returned its verdict in this action, finding defendants McDaniel, Dalton, Holman, Dixon, Johnson, and through the official supervisory defendants, the City of Fayetteville, liable for violating plaintiff's constitutional rights and assessed

compensatory damages at one thousand dollars. As a result of the jury's verdict, the parties have filed numerous post-trial motions. Pending before the court are: (1) defendant City of Fayetteville's motion for judgment notwithstanding the verdict or, alternatively, to amend the judgment or dismiss; (2) defendant Dalton, Holman, Dixon, Johnson and City's motion for judgment notwithstanding the verdict and a new trial; (3) defendant McDaniel's motion for judgment notwithstanding the verdict and for a new trial; and (4) plaintiff's motion for a new trial solely on the issue of compensatory damages.

The parties have responded to all opposing motions and the court heard oral argument on each motion in Wilmington, North Carolina, on March 5, 1985. Thus, all post-trial motions are now ripe for disposition and will be addressed *seriatim.*

A. *Defendant City of Fayetteville's motion for judgment notwithstanding the verdict or, alternatively, to amend or dismiss*

The defendant City contends the court's instructions to the jury regarding the status of the City and the final judgment entered in this action were erroneous because: (1) there was no separate instruction given as to the City; (2) the verdict form made no independent reference to the City; (3) the jurors were told that the City could be held liable through the acts or omissions of the supervisory defendants sued in their official capacities; and (4) the final judgment holds the City liable as a co-defendant absent a separate finding of liability by the jury.

Defendant's contentions represent a continuation of the argument made by defense counsel at trial, that the City should somehow be divorced from the actions of the supervisory defendants and, further, that even assuming the City was "responsible" for any monetary judgment

imposed on the supervisory defendants, the City was not "liable." The court rejected that argument at trial and continues to do so.

In an opinion published just prior to the beginning of trial, *Brandon v. Holt*, —— U.S. ——, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985), the United States Supreme Court held that a § 1983 judgment against a public official "in his official capacity" imposes *liability* on the entity he represents. In *Brandon*, the court made explicit what was previously implied in *Monnell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); and *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

Applying the principles of the above-cited cases to this action, it seems clear that the actions of the supervisory defendants, sued and found liable in their official capacities, are fairly attributable to the defendant City. A municipality is an entity; it cannot and does not act by itself. It must act by and through its agents and employees. When a citizen's constitutional rights are violated by a *de facto* policy or custom which a supervisor of a municipality's Police Department either (1) developed or maintained or (2) was aware of or reasonably should have been aware of and which the supervisor had the authority to rectify or render ineffective, but, instead, in conformity with such policy or custom, the supervisor failed to act within the scope of his authority to do so and, further, where such action or failure to act amounts to gross negligence or deliberate indifference to the constitutional rights of the citizens, then the municipality as well as the supervisor should reasonably be held accountable.

The above instruction was essentially given to the jury. It is correct and in accordance with common sense and

law. Defendant's motion predicated on an attack on the validity of this instruction is therefore DENIED.[1]

To the extent the defendant City argues it was not liable for any actions of any official of the Fayetteville Police Department, this argument is without merit. For the purpose of evaluating the City's potential liability under § 1983, the actions of the Chief of Police and his subordinates, in their official capacities, clearly equates with the actions of the City itself. *Brandon v. Holt*, 105 S.Ct. at 878.

Finally, the City's argument that it is not "liable," even if it is "responsible" for any monetary judgment imposed is, in the Court's view, illogical and in direct contradiction to the clear meaning of *Brandon*. *Brandon* unequivocally holds that a judgment against a public servant in his official capacity imposes *liability*, not simply monetary responsibility, upon the entity that servant represents. *Id.* at 878.

Accordingly, the City's motion for judgment notwithstanding the verdict or, alternatively, to amend or dismiss is DENIED.

B. *Defendants' Motions for Judgment Notwithstanding the Verdict.*

Defendants next move for judgment notwithstanding the verdict pursuant to F.R. Civ. P. 50(b), arguing there was no evidence to support the finding of liability as to any defendant. Defendants moved for a directed

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[1] In point of fact, the trial instruction favored the defendant City, for absent a finding against one of the other defendants in his official capacity, an independent finding against the City alone would have been invalid. By the same token, once a finding against a supervisory defendant was entered, an independent finding against the City was rendered meaningless, since the City, in this case, would only have acted or failed to act through one or more of the supervisory defendants.

verdict at trial which was denied and since Rule 50(b) simply allows a party to renew his motion for a directed verdict, defendants' motions now require that the evidence be re-examined to determine whether the court's prior rulings were correct.

The standard for granting a judgment notwithstanding the verdict is the same as the standard governing the direction of a verdict. *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 13 (9th Cir. 1973); *cert. denied*, 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1973); *O'Neill v. W.R. Grace & Co.*, 410 F.2d 908 (5th Cir. 1969). A motion for judgment notwithstanding the verdict presents a question of law as to whether or not, when all of the evidence is considered, together with all reasonable inferences therefrom in favor of the opposing party, there exists a failure or lack of evidence to prove any necessary element of the party favored by the verdict's case. *Ries v. Sanders*, 34 F.R.D. 468, 470 (N.D. Miss. 1964). In reviewing the evidence, the court may not weigh the evidence or the credibility of any witness. *Singer Co. v. E.I. duPont de Nemours & Co.*, 579 F.2d 433 (8th Cir. 1978). Essentially, a trial court may only grant a judgment notwithstanding the verdict "when the evidence points all one way and is susceptible to no reasonable inferences sustaining the position of the nonmoving party." *Id.* at 441; 5A *Moore's Federal Practice* § 50.07(2).

Defendants contend the evidence points to only one possible conclusion, namely that plaintiff was not kneed in the groin as alleged. The court disagrees.

Plaintiff presented twenty-six (26) witnesses at trial, all tending to prove either the assault in question or a pattern of misconduct within the Fayetteville Police Department (F.P.D.) The plaintiff and an eyewitness friend, Norman Williams, testified that an unprovoked

assault by defendant McDaniel occurred in the basement of the Law Enforcement Center, proximately causing plaintiff's injury. Plaintiff's complaints of pain and his subsequent account of the incident were corroborated, in varying degrees, by witnesses Radosivich, Hess and Herzog. In addition, the testimony of Dr. Steven Rochman, plaintiff's treating physician, clearly supported plaintiff's statement as to the cause and severity of his injury.

Seven (7) lay citizens of Fayetteville, eight (8) present and former police officers of the F.P.D., an assistant district attorney from the Twelfth Judicial District, an expert in police civil liability and the former police attorney all testified in support of plaintiff's allegations regarding a *de facto* policy, practice or custom within the F.P.D. of brutality, cover-up and misconduct. In addition, hundreds of documents contained in the two exhibit notebooks, many of the exhibits being internal F.P.D. documents, clearly assisted plaintiff in establishing his major allegations of an unconstitutional quota system for arrest, failure to discipline officers, failure to investigate citizens' complaints, failure to supervise officers, cover-up of police misconduct, and repeated acts of excessive force and brutality. As previously stated by this court in denying the supervisory defendants' motion for summary judgment, genuine issues of material fact with regard to all of plaintiff's allegations were "painfully obvious."

In conclusion, the evidence in support of plaintiff's allegations against all of the defendants, taken in a light most favorable to the plaintiff, was substantial. The jury's verdict on the issues of liability was supported by the evidence, and was clearly reasonable. *See infra* at 647-648. Accordingly, defendants' motions for judgment notwithstanding the verdict are DENIED.

C. *Defendants' motions for a New Trial on the ground that the verdict was against the weight of the evidence*

F.R. Civ. P. 59(a) requires that the trial court set aside the verdict and order a new trial, even if the verdict is supported by substantial evidence, if the verdict is: (1) against the clear weight of the evidence; or (2) based on false evidence; or (3) will result in a miscarriage of justice. *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891-92 (4th Cir. 1980); *Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959). A motion for a new trial differs from that of a motion for judgment notwithstanding the verdict in that the court must weigh the evidence and the credibility of the witnesses. *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d at 891. The trial court is not required to take that view of the evidence most favorable to the verdict winner. Indeed, the court is required to weigh the evidence for itself.

Defendants having made the motion for a new trial, the court is obligated to briefly weigh the evidence and assess the credibility of the key witnesses at trial. This determination will not favor the defendants.

There were two issues of liability at trial, first as to whether defendant McDaniel assaulted the plaintiff by kneeing him in the testicles proximately causing plaintiff's injury and second, in shorthand form, whether the assault by McDaniel proximately resulted from a *de facto* policy, custom or practice developed or maintained by the supervisory defendants, or of which they reasonably should have been aware, and as a result of which, the supervisory defendants' actions or omissions amounted to gross negligence or deliberate indifference to the constitutional rights of others.

Evidence in support of the jury's verdict as to the first issue, defendant McDaniels' liability, was substantial.

McDaniel denied ever striking the plaintiff and rested his defense on the theory that plaintiff's severe injury occurred earlier in the day when he allegedly fell on a rock or log on a riverbank, thereby rupturing his testicle. Having listened intently to all the testimony in the trial of this action, the court is frank to say this defense appeared to be based on pure speculation and conjecture. Little, if any evidence was presented in support of this theory and that which was presented conflicted with the theory itself. *See infra* at 648.

On the other hand, plaintiff presented a number of witnesses, who in varying degrees circumstantially corroborated his version of the events on November 19, 1983. The plaintiff, and eyewitness Norman Williams, testified McDaniel kneed plaintiff in the testicles without provocation or justification. Although stunned, plaintiff stated he felt little immediate pain. The pain began within minutes of the incident and increased rapidly, as did the swelling of his testicle. When asked why he didn't report the assault to the state magistrate, whom he saw within minutes of the assault for probable cause and bond purposes, plaintiff testified he kept quiet because (1) the magistrate was a female and he was embarrassed due to the nature of the injury and (2) he was scared because he was still in McDaniel's custody at the Law Enforcement Center. Although the court was somewhat dubious of plaintiff's testimony at first, his version of the post-incident facts was subsequently corroborated by a number of witnesses.[2]

Louis Radosovich, a jailer, with no interest in the outcome of this case and clearly, given his profession, not a man likely to be aligned in plaintiff's corner, testified that as soon as he took custody of the plaintiff (*within minutes of the assault*), Spell told him (1) that he had

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[2] The court notes the testimony at trial established that the plaintiff has never given a *significantly* different version of the assault at any time.

just been kicked in the testicles by a Fayetteville police officer; (2) that he was experiencing a great deal of pain; and (3) the reason he failed to tell the magistrate of the assault was because he was embarrassed and scared. Radosovich further testified plaintiff appeared to be in distress when he filled out the intake sheets before taking plaintiff to the jail. The court finds Radosovich to have been extremely credible and given the narrow time frame involved, finds it difficult to credit defendants' argument that plaintiff had by this time already formulated a plan to blame his earlier injury on McDaniel as a means to get out from under his pending criminal charges.

Plaintiff also told his attorney, Paul Herzog, the same story two days later and Herzog's testimony vividly described plaintiff's increased pain and deteriorating physical condition. The court finds Herzog's testimony to have been extremely credible.

Further support and critical support came from plaintiff's treating physician, Dr. Steven Rochman, who testified he had only seen one injury this severe in his professional career and that, given the precise force required to cause such a severe injury, plaintiff could not, in his opinion, have sustained such an injury simply by falling on a rock or a log as defendants theorized. Dr. Rochman, a urologist, who was not hired by the plaintiff as an expert and who had no interest in the outcome of the case, was also extremely credible and his detailed testimony as to the probable causes of plaintiff's injury and the severity of the injury gave significant credence to plaintiff's testimony. In addition, Dr. Rochman's testimony helped explain one weakness in plaintiff's case, the lack of immediate pain at the time of the blow to the testicles.

In contrast to Dr. Rochman, defendants presented the testimony of a non-treating, non-examining expert physician, hired by the defendants, Dr. William Jordan. Dr.

Jordan testified that, in his opinion, plaintiff definitely could have suffered the injury in a fall on a rock or a log. The court has no reason to doubt the sincerity of Dr. Jordan's view; however, given the time scenario involved, it seems Dr. Jordan meets himself coming and going. Dr. Jordan testified that, even given plaintiff's prior alcohol and drug consumption, plaintiff should have experienced extensive pain simultaneous with the blow to his testicles. Thus, defendants argued, plaintiff's lack of such a showing of immediate pain as evidenced by the testimony of the plaintiff and Norman Williams, demonstrates the gap in plaintiff's version of the facts.

The problem with this testimony by Dr. Jordan is that it makes the defense theory that plaintiff's injury occurred earlier in the day even more implausible, given McDaniel's prior testimony that when he arrested Spell, sometime after the injury supposedly occurred, plaintiff was not in pain or injured in any manner. If, according to Dr. Jordan, plaintiff should have experienced pain immediately upon the blow, then plaintiff should have been in excruciating pain a few hours later when McDaniel arrested him. It seems to the court much more reasonable that plaintiff's pain began as plaintiff testified five to ten minutes after the assault, then a few hours after his alleged fall on a rock—coincidentally not ten minutes after plaintiff alleged McDaniel kneed him.

Finally, testimony from one of defendant McDaniels' key witnesses concerning the events of November 19, 1983, Officer Kenneth Wioskowski, convinces the court that the jury's verdict of liability on the first issue was clearly supported by substantial evidence. About the best that can be said for Officer Wioskowski is that he contradicted defendant McDaniel's testimony, strongly contradicted his own prior deposition testimony and was convincingly impeached by the plaintiff on cross-examination through the use of documents of record. In so testifying,

Wioskowski cast considerable doubt on McDaniel and L.D. McNair's testimony, as well as destroying his own credibility.[3]

Although this recitation of the evidence on the first issue has been cursory, it is sufficint for purposes of determining defendants' motion as it relates to the incident on November 19, 1983. Even without considering the substantial evidence of the atmosphere within the F.P.D. under which defendant McDaniel was trained and supervised, the court concludes the jury's verdict on the first issue was not against the weight of the evidence and, in fact, was demonstrably supported by the evidence.

With regard to the second issue, the trial record is replete with testimony supporting the jury's verdict against defendants Dixon, Dalton, Holman and Johnson. Plaintiff presented eight (8) present and former members of the F.P.D. whose testimony painted a fairly convincing and disturbing portrait of the policies and practices existing within the F.P.D. during the relevant time period. These witnesses, along with the documents contained in plaintiff's exhibit 71, provided the backbone of plaintiff's *Monnell* allegations. For the most part, the police witnesses had nothing to gain and everything to lose by testifying for the plaintiff. The testimony of Officers Livingston, Lushis, Gardner, Fischer, Freeman and Matthews was extremely credible. Their testimony, particularly with regard to plaintiff's allegations of a quota system, failure to discipline, failure to supervise, and the creation of an atmosphere of cover-up and abuse within the F.P.D. was convincing and, in many cases, uncontradicted.

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[3] Plaintiff also introduced evidence of prior complaints of excessive force and misconduct on the part of McDaniel through a series of documents, citizens testimony and limited testimony of certain officers.

The court also found the testimony of Jim Ammons, an assistant district attorney, highly relevant and probative on the issues of cover-up and discipline. His testimony of the *Parker* investigation or lack thereof by the F.P.D. was particularly damaging to defendants Dixon and Johnson.

Finally, the instances of confirmed and uncontradicted misconduct demonstrated in defendants' own internal affairs documents was, in the court's opinion, devastating to defendants' case. Although Dr. Kirkham's expert opinion was somewhat tainted by defendants' effective cross-examination, his basic analysis of the evidence against the supervisory defendants contained in the documents within plaintiff's Exhibit 71 was not. These documents alone provide ample support for the jury's verdict on issue two.

Further recitation of the evidence would be redundant and serve no useful purpose. Defendants' motions for a new trial on the basis that the verdict of liability was against the weight of the evidence are DENIED.

D. *Defendants' motions for a New Trial on the basis of the admission of prejudicial evidence and erroneous jury instructions*

F.R. Civ. P. 59(a) further allows a motion for a new trial on the basis that substantial errors were committed at trial in the admission or rejection of evidence or the giving or refusal of instructions. *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 381 (D. Pa. 1982); *Diane Manufacturing Co. v. Sheffield Industries*, 514 F. Supp. 185, 186 (D. Fla. 1981).

Defendants contend the court erroreously admitted extrinsic evidence of acts of misconduct on the part of all defendants in violation of F.R. Evid. 404(a). The problem with defendants' argument is that it considers any

evidence of excessive force, brutality, or a failure to train, supervise or discipline on the part of any named defendant, evidence essential to proving plaintiff's *Monnell* allegations, as evidence of the defendants' character. Were the court to have sustained defendants' objections to this evidence, plaintiff would have been utterly unable to prove his claims. The evidence of defendants' misconduct lay at the heart of plaintiff's complaint. It was not introduced to prove defendants' character, rather it was introduced and admitted as substantive evidence in support of the *Monnell* allegations in plaintiff's complaint. *See Wood v. Breier*, 54 F.R.D. 7, 13 (E.D. Wisc. 1972). Therefore, defendants' motion for a new trial on this basis is DENIED.

Defendants also argue that the court improperly instructed the jury in response to their question regarding whether they could consider evidence of the problems within the police department on the first issue. The court has reviewed its response to the jury and finds it correct and in accordance with law.

Essentially, the court simply repeated its prior instruction that the jury could consider any or all of the evidence as it related to the *credibility* of any witness. The court further instructed the jury that evidence could be considered substantively "if and only if" the evidence related to any action or inaction on the part of defendant McDaniel and reminded the jury that they were to consider the issue of defendant McDaniel's liability independent of the supervisory defendants' liability. Clearly, the jury could properly consider defendant McDaniel's work environment in determining whether or not he committed the assault upon the plaintiff. The remander of the response instruction was a duplicate of the court's initial instructions on the first issue and the burden of proof.

Having found no error in this instruction, defendants' motion for a new trial on this basis is DENIED.

E. *Plaintiff's Motion for a New Trial on Compensatory Damages and Defendants' Motions for a New Trial on the ground of Compromise*

Having determined defendants' motions regarding the sufficiency of the evidence, the court reaches the last and most troublesome issue before it; to-wit, plaintiff's motion for a new trial on the issue of compensatory damages in conjunction with defendants' motions for a new trial on the ground of compromise. Meritorious arguments abound on both sides of the issue; however, after much thought, a considered and reasoned analysis has led the court to reluctantly conclude that principles of justice and fairness dictate plaintiff's motion be GRANTED and defandants' motions be DENIED. Accordingly, for the reasons set forth herein, a new trial on the issue of compensatory damages is ORDERED for April 2, 1985, in Wilmington.

For purposes of discussion the court will consider plaintiff and defendants' motions together, since an analysis of plaintiff's motion must, of necessity, include a decision on whether the jury's verdict was a compromise on its face.

Rule 59(a) of the Federal Rules of Civil Procedure provides that a new trial may be granted "on all or part of the issues." A new trial may be limited to the issue of damages, *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931), and this power extends to granting a new trial because of inadequate damages. *Spero-Nelson v. Brown*, 175 F.2d 86 (6th Cir. 1949).

In the case *sub judice*, plaintiff contends the jury's award of $1,000 compensatory damages is so inadequate relative to the evidence and the injury suffered by the plaintiff that it shocks the conscious and to allow it to stand would be unreasonable. Plaintiff argues that once liability was established, he was entitled to compensation

for his medical bills, pain and humiliation suffered, disfigurement and permanent loss. The award of compensatory damages, Spell contends, was inconsistent with the jury's express finding that McDaniel had assaulted plaintiff, an assault so brutal that it ruptured plaintiff's testicle. Plaintiff contends that, although the jury believed Spell had been kneed in the testicles, when it came time to award damages, it acted on the basis of impermissible considerations, such as an unwillingness to give money to an admitted and convicted drug felon.

Defendants agree that the verdict was inconsistent and concede the compensatory damages were unreasonable, but urge that the jury, unable to conclude the issue of liability in favor of plaintiff, rendered a compromise verdict. As a result, defendants claim they were prejudiced and are now entitled to a new trial on all issues.

Plaintiff has responded, arguing that the original verdict definitively established liability, and that forcing him to re-litigate that issue places an unfair burden on him, given the severability of the evidence as to liability and damages. Plaintiff further argues that if any prejudice occurred, it was in favor of defendants, a young police officer and his supervisory officials, and not in favor of the plaintiff, a drug trafficker. Competing inferences having been advanced by both parties, the court must apply the law to the facts and decide between them.

A partial new trial on damages may not be granted if it would infringe upon a litigant's Seventh Amendment right to a jury trial. *Burger King Corp. v. Mason*, 710 F.2d 1480, 1486 (11th Cir.1983). In *Gasoline Products Co. v. Champlin Refining Co., supra*, the Supreme Court enunciated the standard which governs partial new trial practice:

> [W]here the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and

> separable from the others that a trial of it alone may be had without injustice.

Id. at 50, 51 S.Ct. at 515.

Thus, a jury verdict influenced by an improper compromise, *on its face*, cannot stand and a complete new trial is required. *See, e.g., Lucas v. American Manufacturing Co.*, 630 F.2d 291, 294 (5th Cir.1980); *Bartholemew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959). A compromise verdict results when jurors resolve their inability to make a determination with any unanimity as to liability by finding inadequate damages. *See Freight Terminals, Inc. v. Ryder System, Inc.*, 461 F.2d 1046, 1053 (5th Cir.1972). In this Circuit, a new trial on all issues is required when a "totally inadequate verdict was rendered which could *only* have been a sympathy or compromise verdict . . . [b]ut where there is no *substantial* indication that the liability and damage issues are *inextricably interwoven* . . . a second trial limited to damages is entirely proper." *Great Coastal Express, Inc. v. International Brotherhood of Teamsters, etc.*, 511 F.2d 839, 846 (4th Cir.1975); *Southern Railway v. Madden*, 235 F.2d 198 (4th Cir.1956), *cert. denied*, 352 U.S. 953, 77 S.Ct. 328, 1 L.Ed.2d 244 (1956) (emphasis added). As stated by the Fifth and Eleventh Circuits, a compromise verdict "is one where it is *obvious* that the jury compromised the issue of liability by awarding inadequate damages." *Burger King Corp. v. Mason*, 710 F.2d at 1487; *Freight Terminals, Inc. v. Ryder System, Inc.*, 461 F.2d at 1053 (emphasis added).

In order to determine whether or not a compromise verdict was reached by the jury, in cases where an inadequate award of damages resulted, courts have considered a number of factors.[4] These factors include (1) clarity

[4] Statements made by jurors and not part of the trial record cannot be used to impeach their verdict. Extrinsic evidence, such as newspaper reports of juror's post-trial statements may not be

of the jury instructions and verdict form; (2) length of the jury deliberations; (3) strength of the evidence as to liability; (4) questions and notes from the jury during deliberations; and (5) whether the case involved a sympathetic plaintiff and unsympathetic defendant. *See, e.g., Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510 (11th Cir.1983). Starting from the proposition that a jury's verdict is to be afforded every inference that it is proper and honest, the court will apply the above factors *seriatim.*

First, the court's instructions to the jury clearly mandated that they decide the issues of liability prior to any consideration of damages. Absent compelling reasons to believe these instructions were not followed in this respect, the court is extremely reluctant to enter a finding that the jury violated its oath and departed from the order of issues outlined by the court.

Similarly, the verdict form used by the jury in this matter clearly set forth the order of the issues for determination. As completed by the jury, the form reflects a rational and orderly determination of the issues as evidenced by the determination of no liability as to defendant Smith.

Second, with regard to the length of jury deliberations, considering this was a three week trial in which forty-five witnesses appeared, hundreds of documents were introduced, and the jury had to determine four independent issues as to six individual defendants, the court concludes that thirteen (13) hours of jury deliberations was not extraordinarily long, and in fact, was quite reasonable. This in sharp contrast to the major case cited by defendants, *Mekdeci, supra,* wherein the court found a compromise verdict in large part because the jury sent word

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considered. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 448 (2d Cir. 1959).

to the trial court that it was "hopelessly deadlocked" after four days of deliberations and then returned an inadequate verdict on the fifth day immediately after receiving a modified *Allen* charge. *Id.* at 1515. *See also Hatfield v. Seaboard Airline R.R. Co.*, 396 F.2d 721, 724 (5th Cir.1968).

The third element to be considered and perhaps the one given the greatest weight, is the strength of the evidence of liability.

As previously summarized in a cursory fashion, the evidence supporting the jury's verdict on issues 1 and 2 was substantial and with regard to some defendants, overwhelming. In fact, as to the supervisory defendants, the evidence of liability was so clearly established that defendants in their motion suggest the jury was so incensed by their actions that they "jumped over" the issue of McDaniel's liability to get at them. Defendants have had a fair trial on the issues of liability and the verdicts against them are reasonable in light of the evidence. As the Fifth Circuit has stated in *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 282 (1975).

> . . . even if the jury's verdict in its entirety was affected by undesirable factors, if the fact of liability is nonetheless fairly demonstrable . . . it will not be blindly assumed that the liability issue was wrongly decided. A jury's finding as to liability can be binding even though its monetary award is found to be [inadequate] or even improperly influenced—our deference to and faith in the jury system demands at least this much. *Cf. Pingatore v. Montgomery Ward & Co.*, 6 Cir.1969, 419 F.2d 1138, 1142-1143, cert. denied, 398 U.S. 928, 90 S.Ct. 1818, 26 L.Ed. 90 (1970) (grossly improper argument required new trial as to damages only; substantial evidence supported jury verdict on liability.) If passion, prejudice, caprice, undue sympathy, arbitrari-

> ness or more taints only the damage award and not the liability assessment, the proper response is . . . a new trial addressed to damages alone.

With regard to the fourth element, questions from the jury, application of this factor to the case at bar likewise fails to lead to the conclusion that the verdict was a compromise. Only one question was received from the jury and that question indicated a proper consideration for the distinction between liability issues one and two. Unlike the jury in *Mekdeci, supra*, which sent the court five (5) notes, including one stating it was "hopelessly deadlocked" and another attempting to qualify its verdict, the jury's communications with this court in the case *sub judice* were limited and reasonable.

Finally, the court must consider the fact that this case is not the typical case for the finding of a compromise verdict. In most of the cases cited by counsel where a compromise was found, there have been close questions as to liability with strong affirmative defenses which have been resolved against an "unsympathetic" defendant and in favor of a "sympathetic" plaintiff. *See, e.g., Schuerholz v. Roach*, 58 F.2d 32 (4th Cir. 1932).

In this action, plaintiff is a five time convicted drug felon and traffiicker. Defendant McDaniel is a young police officer and the remaining individual defendants were McDaniel's supervisors. Evidence of possible sympathy for McDaniel is found in the jury's question to the court as to whether they were to disregard "the problem within the police department" in determining McDaniel's liability. It is plausible to suggest that some jurors were concerned about whether McDaniel should be held accountable for doing what he had been taught and encouraged to do by the supervisory defendants.

Furthermore, it is not unlikely that some jurors were concerned with assessing damages against the municipal defendant knowing or suspecting that the cost would be

passed on to innocent taxpayers. In summary, this case is not one where the jury, manifestly, awarded plaintiff a small verdict out of sympathy for his suffering and without regard to the question of real liability. *Southern Railway Co. v. Madden*, 224 F.2d at 321, *See also Young v. International Paper Co.*, 322 F.2d 820, 823 (4th Cir. 1963).

Having reviewed the above factors and found that none of them indicate a verdict "which could only have been a sympathy or compromise verdict," the court turns to defendants' argument that the award of minimal damages is by itself, sufficient to prove a compromise. This assertion is simply not supported by the law.

A nominal or inadequate finding of damages by itself does not automatically mandate the conclusion that the award was the product of a compromise verdict. *Burger King Corp. v. Mason*, 710 F.2d at 1487; *Hadra v. Herman Blum Consulting Engineers*, 632 F.2d 1242, 1246 (5th Cir.1980), *cert. denied* 451 U.S. 912, 101 S.Ct. 1983, 68 L.Ed.2d 301 (1981). Indeed, if inadequate damages were the sole test for compromise, Rule 59(a) would serve no purpose. The inquiry must focus on indicia of compromise *apparent from the record* as delineated and discussed above. *Burger King Corp. v. Mason*, 710 F.2d at 1487; *Mekdeci v. Merrell National Laboratories*, 711 F.2d at 1513-1514.

In the cases cited by defendants, it was the unique circumstances taken together in each trial that provided sufficient indicia of compromise. For example, in *Mekdeci, supra*, it was a prolonged jury deliberation with a number of jury notes and the quick delivery of an inadequate verdict after a modified *Allen* charge that established a compromise. 711 F.2d at 1515. In *Lucas v. American Manufacturing Co., supra*, cited in *Mekdeci*, the jury returned an inadequate award for the plaintiff after the district court informed the jury of an approach-

ing hurricane and admonished the jury either to finish their deliberations within a brief period of time or return at a later date. *Id.* at 1514.

By contrast, in the case at bar, there is no *substantial indication* that the jury's verdict was the result of compromise of the liability and damage questions. It is just as reasonable to assume that the jury disregarded the court's instructions on damages because it improperly considered (1) the effect of a substantial judgment on the taxpayers of Fayetteville or (2) plaintiff's character and extensive criminal record.

The record contains absolutely no indicia of a compromise other than the low amount of damages. The jury reached its verdict within a reasonable period of time. It obviously was not deadlocked. The jury communicated only once with the court and that communication was reasonable. The jury did not attempt to qualify its verdict. Evidence of liability was substantial. Finally, the low award of damages can reasonably be explained by the jury's consideration of other improper factors. The totality of the circumstances simply does not point unerringly to a compromise verdict.

In this action, then, the court concludes the issues of liability and damages are distinct and separable. *See, e.g., Burger King Corp. v. Mason*, 710 F.2d at 1487-88; *Wheatley v. Beetar*, 637 F.2d 863, 867-68, 2d Cir.1980); *Ries v. Sanders*, 34 F.R.D. at 477. An erroneous determination as to damages should not and will not affect the reasonable determination of liability. Evidence as to damages sustained by the plaintiff is severable from any evidence as to liability, for despite the number of defendants found liable, there is but one harm to the plaintiff and the jury should have awarded Spell reasonable compensation for his injuries. In view of the undisputed evidence of plaintiff's medical expenses, which clearly exceeded the jury's $1,000 verdict, it is evident that the jury did not comply with the instructions of the court in

determining its award of compensatory damages. Defendants concede the jury's award was grossly inadequate, given the finding of liability, and agree that it would shock the conscience to allow the present award to stand.

The jury, having failed to recognize, at a minimum, the undisputed facts concerning plaintiff's injuries and expenses and to award him reasonable compensatory damages to which he was entitled, a new trial on the issue of damages is mandated. *Brown v. Wacholz, Inc.*, 467 F.2d 18, 21 (10th Cir.1972).

> [I]t would be grossly unfair to plaintiff, as well as contrary to the spirit of F.R. 59, to require a retrial of the question of defendant's culpability which has already been decided by the jury in plaintiff's favor. Moreover, a grave injustice would occur to a plaintiff if, having submitted the question of liability to a jury, and having obtained a favorable verdict, a plaintiff should be compelled to risk another trial, with a possibility of an adverse verdict, solely because a jury failed to take into consideration all of the elements of damages as clearly instructed by the court.

Wheatley v. Beetar, 637 F.2d at 867-68 citing *Yates v. Dann*, 11 F.R.D. 386, 394 (D.Del.1951). *See also Devine v. Patteson*, 242 F.2d 828, 832 (6th Cir.1957). This court is not willing to take away plaintiff's hard fought and fairly won verdict of liability merely to correct an unjustly inadequate award of damages that was not clearly and substantially the product of a compromise. Accordingly, defendants' motion for a new trial are DENIED and plaintiff's motion for a new trial on the issue of compensatory damages is GRANTED.

F. *Procedural and Scheduling Guidelines for New Trial on Damages*

1. A new trial on the issue of compensatory damages will be held in Wilmington, commencing April 2, 1985,

at 10:00 a.m.[5] On the issue of damages, defendants may not deny liability as established by the jury on February 20, 1985. The new trial will be solely and strictly limited to the narrow issue of how much money will fairly and adequately compensate plaintiff for his damages. The jury will be instructed to accept as fact that defendant McDaniel kneed plaintiff in the testicles on November 19, 1983, proximately causing his injuries and that defendant McDaniel's actions proximately resulted from a *de facto* policy, practice or custom of the supervisory defendants as set forth in issue two of the February 20 verdict form. The jury's task simply will be to determine the extent of plaintiff's injury, suffering and pain resulting from defendants' actions and then to compensate him accordingly. *Wheatley v. Beetar*, 637 F.2d at 868.

2. As with the original trial, this action will be pretried as extensively as the law will allow in a concerted effort to provide the parties with an equitable and expeditious trial. The pre-trial hearing will be held before Magistrate Dixon on March 21, 1985, at 10:00 a.m. in Wilmington.

In accordance with Rule 16 of the Federal Rules of Civil Procedure, Magistrate Dixon is directed at the pretrial conference to:

> (1) *formulate* and *simplify* all legal and factual issues to be tried;
>
> (2) discuss with counsel, at length, admissions of fact and documents so as to avoid unnecessary proof at trial;
>
> (3) issue preliminary rulings by order, pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 62.03, on

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[5] This trial date is final and not subject to change since the grant of a partial new trial, in essence, vacates the prior judgment in this action and renders any appeal of the appeal of the order granting the partial new trial interlocutory.

all *foreseeable* questions of admissibility of evidence. In this regard counsel should have prepared a pre-trial order by the date of the pre-trial conference which notes any and all foreseeable objections to documentary evidence, discovery or foreseeable anecdotal evidence;

(4) obtain, to the greatest extent possible, stipulations from counsel regarding the admissibility and authenticity of documents;

(5) identify and mark all exhibits;

(6) establish a final and binding witness list for plaintiff and defendants;

(7) discuss with counsel the need to adopt any special procedures for managing the conduct of this very limited new trial; and

(8) discuss any additional relevant matters set forth in F.R.Civ.P. 16 and Local Rule 25.00.

3. Given the extended pre-trial conference and concomitant final order by counsel and the magistrate, the local requirement for pre-trial briefs need not be complied with.

4. Since the defenses raised by defendant McDaniel in this limited trial will be exactly the same as those of the supervisory defendants, the court intends to hold all the defendants as one party throughout this new trial for purposes of challenges, examination, time limitations and argument.

5. Each party will receive three (3) peremptory challenges for jury selection at trial as mandated by law. 28 U.S.C. § 1870; *Standard Industries, Inc. v. Mobile Oil Corp.*, 475 F.2d 220 (10th Cir.1973).

6. Proposed *voir dire* questions and jury instructions shall be submitted to the court by Thursday, March 28, 1985, at 4:00 p.m.

7. Again, it is the court's intention to establish time limitations at this trial pursuant to Rule 611(a) of the Federal Rules of Evidence. These limitations are as follows:

(a) Total testimony time for the new trial on compensatory damages shall not exceed sixteen (16) hours;

(b) Plaintiff is allowed a total of eight (8) hours for direct and re-direct examination of his witnesses as well as cross and re-cross examination of defendants' witnesses;

(c) Defendants are allowed a total of eight (8) hours for direct and re-direct examination of their witnesses as well as cross and re-cross examination of plaintiff's witnesses.

(d) The above time limitations are *exclusive* of jury selection, opening and closing arguments.

(e) The clock to be used on all established time periods will be a running clock. Time records will be kept by the Deputy Clerk of Court. All time limitations established are absolute and definitive blocks of time guaranteed the parties. Barring extraordinary circumstances, these limitations are not subject to extension.

8. As in the original trial, the basic evidentiary guidelines set forth on pages 5-6 of this court's January 7, 1985, order will govern the April 2 trial.

SO ORDERED.[6]

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[6] The Clerk of Court is directed to inform counsel of the filing of this order immediately upon receipt of the order.

UNITED STATES DISTRICT COURT
E.D. NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 84-06-CIV-3

HENRY Z. SPELL,

Plaintiff,

v.

CHARLES D. MCDANIEL, *et al.*,

Defendants.

July 12, 1984

ORDER

JAMES C. FOX, District Judge.

Plaintiff, Henry Spell, initiated this action pursuant to 42 U.S.C. § 1983 by complaint filed January 26, 1984. Plaintiff seeks compensatory and punitive damages for injuries allegedly caused by police misconduct. Spell predicates his action on a deprivation of his constitutional rights substantively secured by the Fourth, Eighth and Fourteenth Amendments. Jurisdiction is based upon 28 U.S.C. § 1331 and § 1343.

Named as defendants are Charles McDaniel, the allegedly culpable individual officer of the City of Fayetteville Police Department, who directly inflicted the injuries upon plaintiff; William Dalton and Roger Holman, Command Sergeants within the City of Fayetteville Police Department and alleged supervisory officials in this

action; William Johnson, officer in command of the Internal Affairs Division of the City of Fayetteville Police Department, charged with the duty of investigating allegations of police misconduct; Daniel K. Dixon, Chief of the Fayetteville Police Department; John P. Smith, City Manager of the City of Fayetteville with general supervisory power and responsibility over the previously named defendants; and, the City of Fayetteville, North Carolina. All defendants, except McDaniel, are sued solely in their official capacity.

There are a number of outstanding motions before the court. Defendant McDaniel has filed a motion to dismiss pursuant to *Fed.R.Civ.P.* 12(b)(1), (b)(2) and (b)(6); Plaintiff has moved to amend his complaint to clarify his charge against the City of Fayetteville; defendants Dalton, Holman, Johnson, Dixon, Smith and the City of Fayetteville have filed a motion to dismiss pursuant to *Fed.R.Civ.P.* 12(b)(1), (b)(2) and (b)(6); defendants Holman and Johnson have filed a motion for summary judgment; plaintiff has filed a 12(f) motion to strike defendants' affirmative defenses; defendant City of Fayetteville has filed a motion to strike plaintiff's prayer for punitive damages; and plaintiff has filed a motion to compel defendants to comply with plaintiff's request for production of documents, to which defendants have objected and moved for a protective order. The parties have extensively briefed the relevant issues and these matters are now ripe for disposition.

Before the court proceeds to address these contentions, some further description of the allegations in the complaint is in order as a preface to the discussions which follow. In this description as well as in the subsequent discussions, excepting only the discussions of jurisdictional issues and plaintiff's motion to strike, the court accepts the allegations of the complaint as true, as the law requires it to do. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Nothing herein should be

taken as indicating any view on the validity of the allegations of plaintiff's complaint.

Plaintiff alleges, with particularity, that on November 19, 1983, he was arrested by Officer McDaniel in Fayetteville for driving while impaired and possession of a controlled substance. McDaniel transported Spell to the Law Enforcement Center (LEC) for breathalyzer testing and arrest procedures. A breathalyzer examination was conducted before another Fayetteville police official, as required by North Carolina law. Upon completion of the examination, plaintiff was removed from the breathalyzer area in the basement of the LEC to the City Police Assembly Room whereupon McDaniel, without justification, assaulted Spell by repeatedly striking him with his hands and by kneeing him in the testicles with such force that plaintiff suffered permanent loss of his right testicle. Spell has been rendered irreversibly sterile as a result of McDaniel's actions.

Plaintiff further alleges that McDaniel's actions were in furtherance of and under color of the official policy, practice, custom and procedure of the City of Fayetteville. In detail and with precision, plaintiff sets forth the following allegations against the remaining defendants:

(1). Defendants had knowledge, prior to this incident, of repeated allegations of police abuse and assaultive misconduct toward detainees and arrestees;

(2). defendants had prior knowledge of similar allegations of abuse against defendant McDaniel and refused to enforce established administrative procedures to insure the safety of detainees and arrestees;

(3). defendants established and enforced quota systems for arrests and citations thereby encouraging unlawful, and, at times, abusive arrests and detentions;

(4). defendants refused to discipline individual officers and employees found to have committed similar acts of abuse and misconduct;

(5). defendants refused to competently investigate allegations of abuse and assault alleged to have been committed by Fayetteville police officers;

(6). defendants reprimanded, threatened, intimidated, demoted and fired police officers who reported acts of abuse by other officers;

(7). defendants covered up acts of misconduct and abuse by police officers;

(8). defendants rewarded officers who displayed aggressive and abusive behavior towards detainees and arrestees;

(9). defendants failed to adequately train and educate officers in the use of reasonable and proper force.

(10). defendants failed to adequately supervise the actions of police officers under their control and supervision;

(11). defendants condoned and participated in the practice of reducing or dismissing criminal charges against individuals in return for their releasing from civil liability offending police officers; and

(12). defendants fostered and encouraged an atmosphere of lawlessness, abuse and misconduct, which, by November 19, 1983, represented the policy, practice, custom and procedure of the Fayetteville City Police Department.

Plaintiff alleges that the direct and proximate result of defendants' pattern of conduct, described above, was Officer McDaniel's assault on November 19, 1983, resulting in plaintiff's serious and permanent bodily injury and disfigurement. Defendants have answered, emphatically denying all substantive allegations.

The court will now proceed to consider *ad seriatim* all the contentions and motions therefore summarized.

(1). PLAINTIFF'S MOTION TO AMEND

Plaintiff has moved the court to amend his complaint to add the words "the defendant, City of Fayetteville, North Carolina" to paragraph XIV of the complaint. The effect of this amendment is to charge the City, along with its previously named representatives, with certain activities which are alleged to have resulted in the creation of an official city policy, custom and practice. Only defendant McDaniel consents to the amendment.

The second sentence of Rule 15(a) of the Federal Rules of Civil Procedure provides that after a responsive pleading has been filed, as in this case, a party may amend his pleading only by obtaining leave of the court or by consent of the adverse party. The general policy of Rule 15 encourages the court to look favorably on requests to amend. It states that "leave shall be fully given when justice so requires."

Since the function of Rule 15(a) is to enable a party to assert matters that were overlooked or unknown to him at the time he filed his original complaint, leave to amend should be freely granted in the absence of any undue delay, bad faith or dilatory motive. *Foreman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152 (2nd Cir.1968).

Plaintiff simply seeks to correct an inadvertent omission in Paragraph XIV of the complaint. The motion to amend comes at a very early state of the proceedings. Defendants do not contend undue delay, bad faith or dilatory motive exists on the part of the plaintiff.

Defendants do opine that the amendment would cause them substantial prejudice, however, they are unable to articulate any factual basis to support the conclusory claim of prejudice. The City of Fayetteville is a named

defendant and clearly on notice of the allegations contained in plaintiff's complaint. The City is listed in virtually every substantive paragraph in the twenty paragraph complaint. The court finds the City of Fayetteville will not be prejudiced by plaintiff's amendment to paragraph XIV. Therefore, plaintiff's motion to amend is ALLOWED and counsel for plaintiff has five (5) days from the date of service of this order in which to file plaintiff's amended complaint with the court.

(2). DEFENDANT McDANIEL'S MOTION TO DISMISS

DEFENDANT McDaniel has moved the court to dismiss this action pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. Defendant argues (1) lack of jurisdiction over the person; (3) lack of jurisdiction over the subject matter; (3) plaintiff's complaint is conclusory and lacks sufficient factual allegations to support a claim for relief; and (4) plaintiff has stated no claim cognizable under § 1983.

Defendant's 12(b)(1) motion alleging lack of in personam jurisdiction is DENIED, as it is apparent on the face of the pleadings that both the controversy and the defendant have sufficient contacts with this forum to give the court the right to exercise judicial power over defendant McDaniel.

Defendant's 12(b)(2 motion alleging lack of subject matter jurisdiction is also DENIED, as 28 U.S.C. § 1331 and § 1343 have long been recognized as the jurisdictional counterparts to 42 U.S.C. § 1983 actions brought under the Constitution. In addition, defendant's motion to dismiss alleging that plaintiff's complaint is conclusory is wholly without merit and is DENIED. Plaintiff's complaint is replete with factual allegations supporting well-articulated legal theories and certainly is sufficient under Rule 8(a) of the Federal Rules of Civil Procedure.

By contrast, however, defendant's 12(b)(6) motion to dismiss raises numerous complex and intricate questions of law with which this court has struggled before reaching its final decision. Officer McDaniel asserts that the factual allegations in the complaint state no claim of deprivation under the Fourth, Eighth and Fourteenth Amendments. Defendant further contends that the allegations at best amount to mere tortious conduct for assault and battery, which form an insufficient predicate for a § 1983 suit. Finally, McDaniel implicitly argues that in light of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), Spell has shown no actionable constitutional violation under § 1983. The issues raised in this motion admit of no easy solution.

The court is very aware of its special role in applying the law as established by Congress, the Supreme Court and the Courts of Appeals. Its duty and obligation is to attempt to clearly perceive what the law is at any particular moment on a specific issue, and once clearly perceived, to honestly, fairly and forthrightly apply that law irrespective of its own view of whether the law is correct or incorrect. Federal district courts simply do not have the right to disregard the pronouncements of the Courts of Appeals for the circuits in which they sit, nor the unambiguous pronouncements of the Supreme Court. It is generally not the duty of this court to make law, rather it is to follow the law.

However, given the confusion that exists at all levels of the law governing § 1983 actions, neither trial judges nor lawyers are given any simple *per se* rules to follow in deciding whether a set of facts states an *actionable* constitutional deprivation under 42 U.S.C. § 1983. As a means of deciding this case and other similar cases, this court must create, and hereby establishes, a comprehensive analytical framework for making the required differentiation between common-law torts and *cognizable* constitutional deprivations. After a careful review of the case law and consideration of the problem, the court will

now apply what it perceives to be the law of the facts of this case.[1]

To prevail in a civil rights action under § 1983, a plaintiff must establish two elements: (1) that the defendant deprived him of a right secured by the Constitution or laws of the United States and (2) that such deprivation was committed by a person acting under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980). There is no issue in this litigation regarding the second element —any deprivation that occurred was committed by defendants acting under color of state law.

The initial focus of the court's inquiry is whether plaintiff has been deprived of any right secured by the Constitution and laws of the United States. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). The court begins its analysis with some observations about § 1983. Originally enacted as § 1 of the Civil Rights Act of 1871, § 1983 declares

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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[1] It is well established that a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it affirmatively appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). In the context of a motion to dismiss, the court must accept as true all well-pleaded factual allegations and reasonable inferences therefrom. The function of a motion to dismiss under Rule 12(b)(6) is to test the law of a claim and not the facts which support the claim.

The legislative history reveals that § 1983 was modeled on § 2 of the Civil Rights Act of 1866 and was enacted for the express purpose of enforcing the provisions of the Fourteenth Amendment. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Congress sought to protect constitutional rights and wipe out Ku Klux Klan violence in the southern states. The extensive and emotional debates in Congress waxed eloquent on the failure to protect individuals' civil rights. *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir.1982). Representative Perry cried "Sheriffs, having eyes to see, see not; judges having ears to hear, hear not . . ." Cong. Globe, 42d Cong.; 1st Sess. 447 (1871). And Representative Hoar focusing on the purpose of the legislation stated:

> The question is not whether a majority of the people in a majority of the States are likely to be attached to and able to secure their own liberties. The question is not whether the majority of the people in every State are not likely to desire to secure their own rights. It is, whether a majority of the people in every State are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights."

Id. at 334-35, quoted in *Monroe v. Pape*, 365 U.S. at 182, 81 S.Ct. at 481.

The legislation was more than simply remedial. It was a sweeping measure designed to combat widespread deprivation of constitutional rights and state-sanctioned violence. Section 1 of the Act, was aimed at redressing "[m]isuse of power, possessed by virtue of state law

and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941). In both Houses, statements of the supporters of § 1 provide clear evidence of the Congressional intent to enact § 1 as a broad remedy for the violations of federally protected civil rights. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978). Section 1 of the Act was meant to provide, and unquestionably as codified in 42 U.S.C. § 1983 does provide, the means for enforcing substantive constitutional rights in federal court.

However, § 1983 imposes liability solely for violations of rights protected by the Constitution and federal law, not for violations arising simply out of state tort law principles. While § 1983 claims may frequently constitute "a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976), the court has warned that § 1983 is not "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976); *Estelle v. Gamble*, 429 U.S. 97, 104-06, 97 S.Ct. 285, 291-92, 50 L.Ed.2d 251 (1976). Section 1983 does not automatically convert potential tort liability under state law into tort liability under federal law whenever the alleged tortfeaser is the state. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. at 106, 97 S.Ct. at 285, assault and battery do not become violations of the Fourteenth Amendment merely because the defendant is a city police officer. *See, e.g., Baker v. McCollan*, ("false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official"); *Martinez v. California*, 444 U.S. 277, 285, 100 S.Ct. 553, 559, 62 L.Ed.2d 481 (1980) ("not every injury in which a state

official has played some part is actionable under [§ 1983]"); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (not every violation of state tort and criminal assault laws is a violation of substantive due process).

Thus, while some conduct may clearly violate state tort law, it may not rise to the dimensions of constitutional injury. The proper remedy in those instances is a suit in state court under traditional tort principles. *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321 (11th Cir. 1982). The issue facing this court is whether plaintiff's allegations of tortious conduct result from "the sort of abuse of government power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution." *Turpin v. Mailet*, 579 F.2d 152, 169 (2nd Cir.1978) (concurring opinion), *cert. denied*, 439 U.S. 988, 99 S.Ct. 586, 58 L.Ed.2d 662 (1978), quoting Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv.L.Rev. 922 (1976). *See also Williams v. Kelley*, 624 F.2d 695 (5th Cir.1980); *Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir.1982); *Daniels v. Twin Oaks Nursing Home*. In essense, the question simply stated is whether defendants' conduct was sufficiently egregious so as to be "constitutionally" tortious. *Williams v. Kelley*, 624 F.2d at 697; *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); *Howse v. DeBerry Correctional Institute*, 537 F. Supp. 1177 (M.D.Tenn. 1982).

Section 1983 actions premised upon deprivations of a constitutional right fall into two distinct categories. First, there are actions predicated on violations of specific provisions of the Bill of Rights and other substantive guarantees, cognizable by virtue of the particular amendment's incorporation into the Fourteenth Amendment. *See, e.g., Estelle v. Gamble* (Eighth Amendment —cruel and unusual punishment); *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (Sixth Amendment—interference with attorney-client

privilege); *Duncan v. Nelson*, 466 F.2d 939 (7th Cir. 1972) (Fifth Amendment—coerced confession); *Monroe v. Pape* (Fourth Amendment—unreasonable search and seizure); *Egan v. City of Aurora*, 365 U.S. 514, 81 S.Ct. 684, 5 L.E.2d 741 (1961) (per curiam) (First Amendment—deprivation of speech and assembly).

In addition, the due process clause creates substantive rights not explicit in the Bill of Rights. *See Roe v. Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973) (right of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965) (right of privacy); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to interstate travel). Of critical import in this case are the penumbras surrounding the Fourth and Eighth Amendments which give rise to the right of physical integrity for pretrial detainees. *See King v. Blankenship*, 636 F.2d 70 (4th Cir.1980); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir.1978), *cert. denied sub nom. Moffitt v. Loe*, 446 U.S. 928, 100 S.Ct. 1865, 64 L.Ed.2d 281 (1980); *Bellows v. Dainack*, 555 F.2d 1105 (2nd Cir.1977). All of these implicit and fundamental rights are centered in the nebulous Fourteenth Amendment concept of substantive due process.

The second category of constitutional case is the pure procedural due process claim. *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Plaintiff in this type of action alleges a violation of due process but not based on any substantive constitutional provision. *See Barnier v. Szentmiklosi*, 565 F.Supp. 869 (E.D.Mich.1983).

In the case at bar, Spell asserts defendants' tortious conduct rises to constitutional significance and is therefore cognizable under § 1983 on four independent *substantive* grounds: (1) the right to be free from the infliction of cruel and unusual punishment as secured by

the Eighth Amendment; (2) the right of physical integrity to be free from unlawful detention and to be properly cared for and treated as secured by the substantive due process provisions of the Fourteenth Amendment; (3) the right to be secure against unreasonable seizures as secured by the Fourth Amendment; and (4) the privilege and immunity to be free from unlawful assault and injury by state officials as guaranteed by the Fourteenth Amendment.

Turning first to plaintiff's Eighth Amendment claim, the court finds that there is no basis for a pure Eighth Amendment claim. The Eighth Amendment does not apply directly because Spell was not serving a sentence of any kind at the time he was assaulted by McDaniel. *Henderson v. Counts*, 544 F.Supp. 149 (E.D.Va.1982). Spell's status was clearly that of a pretrial detainee and arrestee. The Constitutional prohibition against cruel and unusual punishment applies only to persons convicted of criminal offenses. *See Bell v. Wolfish*, 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861, 1872, 60 L.Ed.2d 447 (1979); *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). It limits the kind of punishment which may be imposed upon conviction. *See, e.g., Estelle v. Gamble*, prohibits punishment disproportionate to the severity of the offense, *See, e.g., Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and places substantive limitations on what acts may be punished under the criminal law, *See, e.g., Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Therefore, to the extent plaintiff's complaint is premised on an Eighth Amendment claim, that claim is hereby DISMISSED.[2] *See Johnson v. Glick*,

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[2] The court does not find that the Fourth Circuit's recent opinion in *Slaken v. Porter*, 737 F.2d 368 (4th Cir. 1984), mandates a different result as *Slaken* is limited to cases involving the unjustified striking or beating of a convicted prisoner.

481 F.2d 1028 (2d Cir. 1973); *Barrier v. Szentmiklosi*, 565 F.Supp. at 871.

In this case, plaintiff also relies and properly relies on a substantive due process right to physical integrity. Due process requires that a pre-trial detainee not be punished. *Bell v. Wolfish*, 441 U.S. at 535, n. 16, 99 S.Ct. at 1872. Numerous § 1983 suits have been maintained based upon injury inflicted by police beatings and shootings under the "liberty" provision of the Fourteenth Amendment due process clause. *See, e.g., Shillingford v. Holmes; Bellows v. Dainack; Popow v. City of Margate*, 476 F.Supp. 1237 (D.N.J.1979); *Cook v. City of Miami*, 464 F.Supp. 737 (S.D.Fla.1979); *Culp v. Devlin*, 437 F.Supp. 20 (E.D.Pa.1977). The right to be free of state-occasioned violence and injury to one's bodily integrity is protected under the Constitution by the substantive guarantees of due process.

The Fourth Circuit has specifically recognized this theory of recovery in § 1983 police assault cases. In *Mishoe v. Collins*, 729 F.2d 1453 (4th Cir.1984), the court stated,

> . . . the due process guarantees of the Fourteenth Amendment include protection from punishment for crime until after conviction by a court of law. Thus, if police act in excess of their lawful authority and beat or inflict corporal injury upon suspects by way of punishment for supposed offenses, their actions are in contravention of due process of law. *Screws v. U.S.*, 325 U.S. 91 [65 S.Ct. 1031, 89 L.Ed. 1495] (1945); *Williams v. U.S.*, 341 U.S. 97 [71 S.Ct. 576, 95 L.Ed. 774] (1951). These rights of individuals secured by the Constitution are protected by the remedy of 42 U.S.C. § 1983. Slip op. at 5-6.

See also King v. Blankenship, 636 F.2d 70 (4th Cir.1980) ("[l]est there be any doubt as to the rule in this circuit, we specifically hold that the unjustified striking, beating,

or infliction of bodily harm upon a prisoner gives rise to liability under 42 U.S.C. § 1983 on the part of one, who acting under color of state law, engages in such conduct without just cause."); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir.1970).

However, in order for liability to attach, the police officer's actions must cross over an ill-defined, but nonetheless very real, threshold which separates state torts from deprivations of constitutionally protected rights. As this court previously stated defendants' conduct must be sufficiently egregious so as to be considered "constitutionally" tortious. Not every push or shove violates the Constitution. In *King v. Blankenship*, the Court of Appeals emphasized that "not every instance of the use of excessive force gives rise to a cause of action under § 1983 merely because it gives rise to a cause of action under state tort law . . . The key phrases [are] 'unjustified striking, etc.' and 'without just cause' . . ." 636 F.2d at 73.

In determining whether a state officer has pierced the constitutional boundary thereby making his abusive conduct actionable under § 1983, *King* directs the district courts to apply the factors set forth in *Johnson v. Glick*, 481 F.2d at 1083, on a case-by-case basis. *Id; See also Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir.1980). *Johnson* articulately identifies the following factors which must be considered:

1. The need for application of force;
2. relationship between the need and the amount of force used;
3. extent of the injury inflicted; and
4. whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

481 F.2d at 1033. If, on balance, the use of force was unreasonable, excessive and unjustified, liability under § 1983 attaches. By the same token, if after balancing the above factors, the use of force was reasonable and justified, although defendants may nonetheless still be liable under state law to plaintiff, no § 1983 liability attaches.

Applying this standard to the case at bar *and taking as true plaintiff's allegations and all reasonable inferences therefrom,* this court is convinced plaintiff has stated a valid § 1983 claim for violation of his substantive due process rights. In this case, the assault by the officer was unprovoked and unjustified. Plaintiff was in custody at the LEC for relatively minor offenses. Spell had been arrested, brought to the LEC by McDaniel, given a Breathalyzer examination—all without incident. Nothing in the record suggests plaintiff struck McDaniel or was trying to escape. The injury to plaintiff was severe and permanent. Should plaintiff prove his allegations, the physical abuse inflicted in this case would be so disproportionate, malicious and sadistic that it would, quite literally, shock the conscience of the court. Decency, security and liberty alike demand that such a tragic misuse of authority transcend the bounds of state tort law and clearly establish a deprivation of constitutional rights. To the extent of defendant's motion to dismiss contends plaintiff fails to state a claim for relief premised on substantive due process grounds, defendant's motion is DENIED.

Plaintiff further alleges that the Fourth Amendment right to be free from unlawful seizures is applicable to the facts of this case. The court agrees. The Fourth Amendment protection against unreasonable searches and seizures, made applicable to the states in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct 1684, 6 L.Ed.2d 1081 (1961), has been held by the Fourth Circuit to prohibit the use of excessive, arbitrary and unreasonable force by police in

making an arrest and processing the arrestee. *Jenkins v. Averett*, 424 F.2d at 1231-32; *Mishoe v. Collins*, Slip. Op. at 5. *See also Shillingford v. Holmes*, 634 F.2d at 265; *Begg v. Moffitt*, 555 F.Supp. 1344, 1357 (N.D.Ill.1983).

Applying, once again, the *Johnson v. Glick* factors to determine if McDaniel's use of force in processing plaintiff was excessive, arbitrary and unreasonable, the court concludes plaintiff has stated a valid § 1983 claim predicated on a violation of his Fourth Amendment rights. To the extent defendant's motion to dismiss contends plaintiff fails to state a claim for relief on this basis, defendant's motion is DENIED.

Finally, plaintiff argues that the privileges and immunities clause of the Fourteenth Amendment provides an additional constitutional basis upon which to hinge his § 1983 action. The privileges and immunities clause is strictly limited to rights of national as distinct from state citizenship. *See Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944); *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 21 L.Ed. 394 (1872). It provides extremely limited protection of individual liberties. The court has found no 1983 case specifically predicated upon a violation of the privileges and immunities clause and therefore holds that it is inapplicable to this action. *See Dandridge v. City of Richmond*, 566 F.Supp. 152 (E.D.Va.1983). To the extent plaintiff's complaint is premised on a violation of the privileges and immunities clause, that claim is hereby DISMISSED.

Having concluded that plaintiff's complaint properly states a claim for deprivation of certain constitutional rights, the question becomes whether that deprivation is actionable under § 1983. The determination of this issue focuses on the Supreme Court's decision in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1980). Defendant argues that *Parratt* precludes this suit because North Carolina provides an adequate post deprivation remedy.

The plaintiff in *Parratt*, a state inmate, alleged that he was deprived of property without due process of law when prison officials negligently lost in the prison mail system a hobby kit plaintiff had ordered. The Supreme Court, in an opinion written by Justice Rehnquist, agreed that plaintiff had been deprived of his property within the meaning of the Fourteenth Amendment. *Id.* at 536-37, 101 S.Ct. at 1913-14. However, the court held that random negligent loss of the inmate's property did not constitute a due process violation where the state provided an adequate post-deprivation remedy. *Id.* at 540-41, 101 S.Ct. at 1915-16.[3] Thus, even though plaintiff had suffered a constitutional deprivation by an official acting under color of state law, the Nebraska post-deprivation tort remedy provided all the due process to which plaintiff was entitled. Therefore, plaintiff's claim under § 1983 was not actionable.

Defendant McDaniel asserts the rationale of *Parratt* applies with equal force to the facts of this case and mandates the dismissal of the action because Spell has a North Carolina State tort remedy. Defendant's argument, on its face, has merit and requires extensive analysis.

Lower federal courts attempting to analyze *Parratt* and apply its reasoning to a myriad of § 1983 fact situations have based their analyses on one or more of four sets of distinctions: (1) negligent vs. intentional deprivations; (2) liberty vs. property interests; (3) procedural vs. substantive constitutional guarantees; and (4) random and unauthorized official acts vs. established procedure,

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[3] The State of Nebraska, where Taylor was incarcerated, provided a tort remedy to persons who suffered property losses at the hands of the state, *See* Neb.Rev.Stat. § 81-8, 209 *et seq.* (1976), similar to provisions of the North Carolina State Tort Claims Act, N.C.Gen.Stat. § 143-291 *et seq.*

policies and custom. *See Holmes v. Ward,* 566 F.Supp. 863, 864-65 (E.D.N.Y.1983).

Parratt dealt with a negligent loss of property. A number of lower courts have attempted to distinguish *Parratt* and limit its scope to only those actions involving negligent deprivations. *See, e.g., Madyun v. Thompson,* 657 F.2d 868, 873 (7th Cir.1981); *Howse v. DeBerry Correctional Institute,* 537 F.Supp. at 1177; *Tarkowski v. Hoogasian,* 532 F.Supp. 791, 794-95 (N.D.Ill.1982); *Parker v. Rockefeller,* 521 F.Supp. 1013, 1016 (N.D. W.Va.1981). The case at bar involves allegations of intentional rather than negligent conduct and, thus, plaintiff would have this court similarly limit the scope of *Parratt.* However, the court declines to do so for three reasons.

First, nothing in *Parratt* suggests that its holding is limited to negligent deprivations. Once it is assumed a random negligent act can be remedied by an adequate post-deprivation procedure, then the same type of procedure can just as easily remedy a random intentional act. *Holmes v. Ward,* 566 F.Supp. at 863. *Irshad v. Spann,* 543 F.Supp. 922 n. 1 (E.D.Va.1982).

Second, to limit *Parratt*'s reasoning to negligent deprivations ignores the citation in *Parratt* to *Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). *Ingraham* dealt with corporal punishment in public schools and held that an intentional liberty deprivation such as paddling did not violate the Fourteenth Amendment because state tort remedies were sufficient to satisfy procedural due process. *Id.* at 679, 97 S.Ct. at 1416.

Finally, even if the court found itself in agreement with the distinction, it is bound by the Fourth Circuit's decision in *Palmer v. Hudson,* 697 F.2d 1220 (1983), *cert. granted,* —— U.S. ——, 103 S.Ct. 3535, 77 L.Ed.2d 1386 (1983), which held *Parratt* applicable to intentional

deprivations. *See also Wolf-Lillie v. Sonquist*, 699 F.2d 864 (7th Cir.1983); *Engblom v. Carey*, 677 F.2d 957 (2d Cir.1982); *Gilday v. Boone*, 657 F.2d 1 (1st Cir.1981); *Thurman v. Rose*, 575 F.Supp. 1488 (N.D.Ind.1983); *Sheppard v. Moore*, 514 F.Supp. 1372 (M.D.N.C.1981).

Other courts have focused on the difference between property and liberty interests in determining whether state tort remedies provide constitutionally adequate procedure. A number of these courts have held that a case involving liberty interests is "of a wholly different nature than one involving property interests and have refused to apply *Parratt* to the former. *Wakinekona v. Olim*, 664 F.2d 708, 715 (9th Cir.1981), *rev'd on other grounds*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); *See, e.g., Richardson v. Fleming*, 651 F.2d 366, 372 n. 10 (5th Cir.1981); *Moorhead v. Government of Virgin Islands*, 556 F.Supp. 174 (D.V.I.1983); *Schiller v. Strangis*, 540 F.Supp. 605, 615 (D.Mass.1982); *Scott v. Donovan*, 539 F.Supp. 255 (N.D.Ga.1982). To some degree this court finds itself in agreement with this distinction. Deprivations of liberty are more repugnant, less readily compensable (if at all), and generally carry more severe consequences for the victim than deprivations of property.

In addition this view finds support in Justice Blackmun's concurring opinion in *Parratt* where he stated he did "not read the Court's opinion as applicable to a case concerning deprivation of life or liberty." 451 U.S. at 545, 101 S.Ct. at 1917.

The court agrees that property deprivations are qualitatively different from deprivations of liberty. Taylor can adequately and easily be compensated for the loss of his hobby kit; it is doubtful victims of police beatings and shootings can ever be adequately compensated for their loss. As Judge Wiseman has stated in *Howse v. DeBerry*,

> To hold that an individual cannot bring suit under Section 1983 when he has been intentionally deprived

> of a clearly protected liberty interest—the right to be safe in his person from physical harm— by one acting "under color of state law," would be to ignore the very purpose of Section 1983 itself . . . [it] would render Section 1983 meaningless in innumerable cases, for many of our most cherished liberties are analogous to rights for which the states provide remedies of some tort.

537 F. Supp. at 1181.

However, the court is not entirely comfortable with basing this opinion on what is essentially an emotional argument. There is no logical reason to distinguish between "property and liberty" for purposes of determining whether the state has provided due process, *see Barnier v. Szentmiklosi*, 565 F.Supp. at 877, and further, the citation in *Parratt* to *Ingraham* gives implicit recognition to the extension of *Parratt* to deprivations of liberty. *See Engblom v. Carey*, 677 F.2d 957 at 964-66 (2d Cir. 1982); *Rutledge v. Arizona Board of Regents*, 660 F.2d at 1352 (9th Cir.1981); *Holmes v. Ward*, 566 F.Supp. at 865; *Eberle v. Baumfalk*, 524 F.Supp. 515 (N.D.Ill. 1981); *Meshkov v. Abington Township*, 517 F.Supp. 1280, 1285-86 (E.D.Pa.1981).

The more proper and legally sound distinction is that premised upon the difference between procedural and substantive constitutional guarantees. It is important to recognize that *Parratt* concerned procedural due process rather than substantive due process. No cognizable claim under § 1983 was alleged because Nebraska, by providing an adequate post-deprivation remedy satisfied the requirements of procedural due process. Plaintiff's claim in *Parratt* did not implicate any of the substantive constitutional guarantees made applicable to the states by the Fourteenth Amendment. *Wolf-Lillie v. Sonquist*, 699 F.2d at 871. Thus, once the Supreme Court in *Parratt* found state procedures adequate to satisfy the require-

ments of due process, the constitutional basis for the § 1983 allegation was eliminated.

In *Parratt* the court itself distinguished between these claims involving specific substantive constitutional guarantees and those involving solely "the Due Process Clause of the Fourteenth Amendment *simpliciter*." 451 U.S. at 536, 101 S.Ct. at 1913. A finding that state action violated an independent substantive right secured by the Constitution is qualitatively different from a finding that such action simply deprived a citizen of his right to procedural due process. *Owen v. Lash*, 682 F.2d 648, 651 (7th Cir.1982). In cases such as the one at bar, where the right asserted does not depend on the procedural protections accorded the plaintiff, but rather stems from a separate substantive constitutional guarantee, the availability of a post-deprivation hearing is of no consequence, since the constitutional violation exists independent of any procedures available to redress the deprivation. *Begg v. Moffitt*, 555 F.Supp. at 1362. The Constitutional violation is complete at the time of the deprivation and no procedure can alter that fact.

Unlike procedural due process which permits the deprivation of life, liberty or property when such deprivation comports with due process of law, substantive due process imposes absolute limits on state action regardless of the process provided. As Justice Blackmun observed in his concurring opinion in *Parratt*, "there are certain governmental actions that even if undertaken with a full panoply of procedural protection are, in and of themselves, antithetical to fundamental notions of due process" 451 U.S. at 545, 101 S.Ct. at 1918 (Blackmun, J., concurring). *See generally*, Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA.L. REV. 201 (1984).

This court agrees with the vast majority of courts which have considered the issue and holds *Parratt* is not

applicable to instances, such as the case at bar, where substantive guarantees of the Constitution are alleged to have been violated as opposed to alleged violations of procedural due process. *See, e.g., Wolf-Lillie v. Sonquist,* 699 F.2d at 872; *Brewer v. Blackwell,* 692 F.2d 387, 395 (5th Cir.1982); *Evans v. City of Chicago,* 689 F.2d 1286, 1298 (7th Cir.1982); *Duncan v. Poythress,* 657 F.2d 691, 704-05 (5th Cir.1981), *cert. dismissed,* 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982); *Begg v. Moffitt,* 555 F.Supp. at 1362; *Irshad v. Spann,* 543 F.Supp. at 926; *Sager v. City of Woodland Park,* 543 F.Supp. 282 (D.Colo.1982); *Martin v. Covington,* 541 F.Supp. 803, 804 (E.D.Ky.1982); *Scott v. Donovan,* 539 F.Supp. at 258.

Finally, some courts have properly focused on the difference between random and unauthorized official acts and established state procedure, practice or custom. This distinction was critical to the *Parratt* decision, wherein the court stated:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the state cannot predict precisely when the loss will occur. 451 U.S. at 541, 101 S.Ct. at 1916.

The court reemphasized this distinction in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Logan had charged his employer with unlawful discrimination under Illinois state law. Inadvertently, the Illinois Fair Employment Practices Commission failed to convene a timely fact-finding conference on plaintiff's charge as required by Illinois law. The Illinois Supreme Court held this action deprived the

Commission of jurisdiction over plaintiff's charge and dismissed the action.

The Supreme Court reversed, holding that Logan's state law cause of action against his employer was "property" within the meaning of the due process clause and that he had been deprived of it. 455 U.S. at 428-33, 102 S.C. at 1153-56. The court further held the deprivation was without due process of law since Logan never got a hearing on the merits of his claim. It noted that *Parratt* involved a loss of property as a result of random and unauthorized act rather than an established state procedure and stated:

> Here, in contrast, it is the state system itself that destroys a complainant's property interest, whenever the Commission fails to convene a timely conference —whether the Commission's action is taken through negligence, maliciousness or otherwise . . . Unlike the complainant in Parratt, Logan is challenging not the Commission's error, but the "established state procedure that destroys his entitlement . . ." *Id.* at 436, 102 S.Ct. at 1158.

Assuming *arguendo*, that this court did not find a decisive distinction between substantive and procedural due process claims, the court would not bar claims where an established state procedure, practice or custom is itself the source of the deprivation. *See Begg v. Moffitt*, 555 F. Supp. at 1360-61. In a case closer to the facts of this action than *Logan*, *Pantoja v. City of Gonzales*, 538 F. Supp. 335 (N.D.Cal.1982), the police placed a drunk man in a holding cell, where he was found dead eight hours later. Plaintiffs, heirs of the man, sued attacking the city's practices and procedures for handling persons taken into custody under the state public intoxication law. Plaintiffs alleged the decedent was deprived of liberty without due process of law. The district court held *Parratt* was inapplicable because plaintiff's claim was based not on a random or unauthorized act, but on

established state procedure for the handling of persons taken into custody under the state law. *See also Holmes v. Ward*, 566 F.Supp. at 866 (attack on police procedure for insuring the separation of an inmate from a proven and deadly assailant).

Plaintiff, in the instant action, does not attack a random and unauthorized act, but a " '*de facto*' policy of brutality which allegedly represents the official policy, custom, practice and procedure of the defendant City." *See* plaintiff's Response to Motions and Memorandum of Law, p. 3. Plaintiff's complaint, adequately supported by factual allegations, is, quite literally, a broadside attack on the basic investigative, training and supervision policies of the City of Fayetteville Police Department.

Therefore, this court holds that *Parratt* does not bar a suit under 42 U.S.C. § 1983, despite the availability of state post-deprivation remedies, where the deprivation is unconstitutional irrespective of the procedural protections accompanying it offered by the state or where the deprivation is occasioned by state procedure, practice, policy or custom and not by a random or unauthorized act. Applying this standard to the case at bar, the court concludes plaintiff states a cognizable claim under § 1983 premised upon a deprivation of plaintiff's constitutional rights secured by the Fourth and Fourteenth Amendments. Therefore, defendant McDaniel's motion to dismiss plaintiff's § 1983 cause of action is DENIED.

(3). DEFENDANTS DALTON, HOLMAN, JOHNSON, DIXON, SMITH AND CITY OF FAYETTEVILLE'S MOTION TO DISMISS

Based on the rationale previously articulated, that portion of defendants' motion predicated on the same grounds as defendant McDaniel's motion to dismiss is DENIED. However, defendants raise two additional arguments: (1) that neither the City nor the supervisory defendants are liable because they are sued solely on a

respondeat superior basis; and (2) that the defendants are entitled to good faith immunity.

A. *Municipal Liability*

Municipal liability presents slightly different considerations from the liability of supervisory officials, although in this action the concepts tend to merge since the supervisory defendants are sued solely in their official capacity.[4] However, for purposes of this opinion, the court finds it useful to separate, at least initially, the discussion of these two concepts.

The essence of defendants' argument is that under 42 U.S.C. § 1983, a municipality cannot be held liable on a theory of *respondeat superior* for the unconstitutional acts of its employees. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Defendants are correct, at least insofar as the argument is taken. In *Monell*, the court made it abundantly clear that liability may not be imposed under a *respondeat superior* theory, that is, merely because the city employs a tortfeasor. *Id.* at 691-92, 98 S.Ct. at 2036-37. *See also Polk Co. v. Dodson*, 454 U.S. 312, 325, 102 S.Ct. 445, 453, 70 L.Ed.2d 509 (1981).

Instead, a municipality is liable only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell*, 436 U.S. at 694, 88 S.Ct. at 2037. Precise standards do not exist with respect to what acts constitute a policy or custom, but several broad guidelines have emerged from the plethora of lower court decisions interpreting *Monell*. *See, e.g., Languirand v. Hayden*, 717

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[4] The court is cognizant of the fact that plaintiff is not alleging all the named defendants, particularly Johnson, acted in a supervisory capacity; however, the court groups the named defendants (except McDaniel) in this manner for ease of discussion.

F.2d 220 (5th Cir.1983); *Bowen v. Watkins*, 669 F.2d 979 (5th Cir.1982); *Turpin v. Mailet*, 619 F.2d 196 (2d Cir.1980), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980); *Spriggs v. City of Chicago*, 523 F.Supp. 138 (N.D.Ill.1981).

First, at "some level of authority, there must be an official whose acts reflect governmental policy, for the government necessarily acts through its agents . . . when an official has final authority in a matter involving the selection of goals or of means of achieving goals, his choices represent governmental policy." *Bowen v. Watkins*, 669 F.2d at 989. Clearly, officially promulgated ordinances, regulations and departmental directives give rise to municipal liability under § 1983 if such policies and decisions lead to the deprivation of constitutional rights.

Second, less than formal municipal conduct can also give rise to § 1983 municipal liability. *Turpin v. Mailet*, 619 F.2d at 200. Municipalities are equally liable for *de facto* policies or practices which engender constitutional deprivation. Informal actions, if they reflect a general policy, custom, practice or pattern of official conduct which even tacitly encourages conduct depriving individuals of their constitutional rights satisfies § 1983 standards. *Wolf-Lille v. Sonquist*, 699 F.2d at 870; *Webster v. City of Houston*, 689 F.2d at 1226. As the Second Circuit noted in *Turpin*, "[t]o require that senior officials must have formally adopted or promulgated a policy before their conduct may be treated as 'official' would for present purposes render *Monell* a nullity, exalting form over substance." 619 F.2d at 200; *See also Spriggs v. City of Chicago*, 523 F.Supp. at 141.

Third, an official policy can be inferred from a municipality's omissions as well as from its acts. *Wellington v. Daniels*, 717 F.2d 932, 935-36 (4th Cir.1983); *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir.1981);

Turpin v. Mailet, 619 F.2d at 202. However, in this circuit, such omissions are actionable only if they constitute "tacit authorization" of or "deliberate indifference" to constitutional injuries. *Wellington v. Daniels*, 717 F.2d at 935; *Avery v. County of Burke*, 660 F.2d at 114. Mere negligent inaction is insufficient. Municipal liability does not stem from a city's simple failure to exercise due care. The alleged breach of duty must be of greater magnitude.

The Fourth Circuit standard logically developed from the rule in the Second Circuit set forth in *Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir.1979), *cert. denied*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979), which held that

> a mere failure by the [municipality] to supervise its employees would not be sufficient to hold it liable under § 1983. However, the municipality] would be held liable if the failure to supervise or the lack of a proper training program was so severe as to reach the level of 'gross negligence' or 'deliberate indifference' to the deprivation of the plaintiff's constitutional rights.

More specifically,

> where senior personnel have knowledge of a pattern of constitutionally offensive acts by their subordinates but fail to take remedial steps, the municipality may be held liable for a subsequent violation if the supervisor's inaction amounts to deliberate indifference or to tacit authorization of the offensive acts."

Turpin v. Mailet, 619 F.2d at 201; *accord Spriggs v. City of Chicago*, 523 F.Supp. at 142; *Popow v. City of Margate*, 476 F.Supp. at 1237; *Leite v. City of Providence*, 463 F.Supp. 585, 590-1 (D.R.I.1978). Thus, tacit encouragement or repeated toleration of known constitu-

tional deprivations upon the part of subordinate personnel can rise to the level of "policy or custom," thereby subjecting the municipality to liability under § 1983.

Plaintiff's complaint alleges that is the custom and practice of the City, acting through certain of its agents, to deprive detainees, arrestees and others of their civil rights in the manner in which plaintiff's rights are alleged to have been violated. The complaint contends the custom or practice is evidenced by:

(1) repeated incidents of assault and abuse;

(2) repeated suits of the nature of this suit;

(3) repeated failure to educate and train police officers;

(4) repeated and deliberate failure to discipline known offenders among the police force;

(5) repeated and deliberate failure to investigate wrongdoing and violations of civil rights on the part of police officers even when the wrongdoing is blatant;

(6) repeated instances on the part of all defendants, either actively or passively, to cover up and absolve such wrongdoing on the part of police officers; and

(7) repeated failure to adequately supervise police officers.

Plaintiff also alleges the City encouraged misconduct by rewarding and commending abusive and assaultive behavior, by use of an arrest quota system, and by dismissing criminal charges against individual arrestees in return for their releasing the offending officers from civil liability. Plaintiff alleges the City's custom or practice has created an atmosphere of lawlessness and a pervasive pattern of misconduct. Finally and critically, plaintiff unambiguously asserts that this municipal custom and policy was a direct and proximate cause of the alleged

harm. On the basis of these allegations, this court finds that the City of Fayetteville is not being sued on the basis of *respondeat superior*. *See Trotter v. City of Chicago*, 573 F.Supp. 1269 (N.D.Ill.1983); *Cook v. City of Miami*, 464 F.Supp. 737 (1979); *Leite v. City of Providence*, 463 F.Supp. at 588.

Plaintiff is not alleging an official formal policy has been enacted, rather plaintiff clearly alleges a pattern or practice of conduct—action as well as inaction—on the part of those in senior departmental and city policy making roles. With regard to the accusations of repeated inaction, plaintiff's allegations are sufficient in that they assert the City's failure to respond to past instances of police misconduct evidences not merely negligence on the part of the City, but, at the very least, reckless and, perhaps, callous disregard of the rights of citizens to be free from the type of injury suffered by plaintiff.

Therefore, the court concludes plaintiff has stated a cognizable claim against the City of Fayetteville under § 1983. Defendants' motions to dismiss as to plaintiff's claim against the City is DENIED.[5]

B. *Supervisory Liability*

As stated previously, the concepts of municipal liability and supervisory liability merge to a great degree in this action because the supervisory defendants are sued solely in their official capacity. Nonetheless, individual culpability is important because the City's liability is predicated upon the specific actions and omissions of its agents —the supervisory defendants.

Defendants Dalton, Holman, Johnson, Dixon and Smith move to dismiss because they did not personally partici-

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[5] This is not to imply that plaintiff's contentions will necessarily withstand an extremely well-documented motion for summary judgment. The court simply finds that the complaint states a claim for relief sufficient to overcome the 12(b)(6) motion.

pate in the incident, i.e. no liability on the basis of the doctrine of *respondeat superior*. Defendants are correct that the doctrine cannot be used in § 1983 actions to hold superior officers liable who have no affirmative link with the misconduct. *Vinnedge v. Gibbs*, 550 F.2d 296 (4th Cir.1977). However, application of that principle of law to the facts *sub judice* does not compel the dismissal sought by defendants because plaintiff does not assert liability premised on that doctrine. Rather, plaintiff alleges defendants are *directly liable* through reckless and deliberate breach of their basic duties to properly train, supervise, investigate and discipline their subordinates. *McClelland v. Facteau*, 610 F.2d 693, 695 (10th Cir. 1979).

As in *McClelland*, defendants argue that plaintiff's attempt to hold them liable is a disguised *respondeat superior* claim. The Tenth Circuit did not agree with that argument and neither does this court. Judge Logan articulately stated the controlling principles:

> A crucial difference exists between liability as a master (*respondeat superior*) and direct liability. *Respondeat superior* is a doctrine of vicarious liability based upon public policy—the notion that the person who benefits by the acts of the servant must pay for wrongs committed by the servant; the one held liable as master need not be at fault in any way. . . . Under direct liability, plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of the injury. The law clearly allows actions against supervisors under § 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color of law of a federally secured right.

Id.

Personal participation is not a necessary prerequisite to imposing liability upon the supervisory defendants.

Avery v. County of Burke, 660 F.2d at 114. The issue is whether defendants have done something or failed to do something which they ought to have done, thereby proximately causing a violation of plaintiff's constitutional rights. *Bowen v. Watkins*, 669 F.2d at 988-89; *Redmond v. Baxley*, 475 F.Supp. 1111, 1116 (E.D.Mich. 1979). The requisite casual connection can be established not only by direct personal participation, but also by failure to perform an act which is legally required or by "setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir.1978). *See Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). Thus, although supervisory officials cannot be held liable on the basis of their employer-employee relationship, liability attaches when their own action or inaction amounts to gross negligence or deliberate indifference and is the proximate cause of the constitutional violation. *Bowen v. Watkins*, 669 F.2d at 988; *Owens v. Haas*, 601 F.2d at 1246; *Redmond v. Baxley*, 475 F.Supp. at 1116; *Leite v. City of Providence*, 463 F.Supp. at 590.

Plaintiff's complaint alleges defendants Holman, Dalton, Johnson, Dixon and Smith failed to control the behavior of subordinate employees, including McDaniel, thereby ratifying or tacitly authorizing the conduct and creating a *de facto* departmental policy.

First, as to allegations of failure to train and supervise, the law in this circuit is that such failure gives rise to § 1983 liability solely in those situations where there is a history of abuse. Only then may sufficient knowledge be imputed to the supervisory personnel. *Wellington v. Daniels*, 717 F.2d at 936; *See also Bowen v. Watkins*, 669 F.2d at 988-89; *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir.1981), *cert. denied*, 456 U.S. 979, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982). However, the citizens of a municipality do not have to endure

a widespread and prolonged pattern of past police misconduct before they can sue the city under § 1983. Liability occurs and recovery may be had for injuries resulting from an utter lack of training or grossly inadequate training of a police force, provided such is the "result of a deliberate and conscious indifference by the city." *Popow v. City of Margate*, 476 F.Supp. at 1246; *Leite v. City of Providence*, 463 F.Supp. at 590-91. Such a rule is consistent with the previously stated requirements of proof regarding municipal liability.

For purposes of guiding the lawyers in the future of this litigation, this court specifically rejects any notion that a single act as isolated incident is sufficient to establish supervisory inaction and therefore liability. *Wellington v. Daniels*, 717 F.2d at 936; *Berry v. McLemore*, 670 F.2d 30 (5th Cir.1982); *Popow v. City of Margate*, 476 F.Supp. at 1246. *But See Owens v. Haas*, 601 F.2d at 1247.

Upon review of plaintiff's complaint, the court holds plaintiff has sufficiently alleged claims of a failure to supervise and train on the part of defendants Dalton, Holman, Dixon and Smith, so as to defeat defendants' 12(b)(6) motion.[6]

Second, regarding investigation of misconduct and discipline of officers, the rule is that where a city's procedure of reprimand is so inadequate or deliberately indifferent as to ratify unconstitutional conduct, the city may be liable under § 1983. *Turpin v. Mailet*, 619 F.2d at 201; *Brandon v. Allen*, 516 F.Supp. 1355, 1360 (W.D. Tenn.1981); *Popow v. City of Margate*, 476 F.Supp. at

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[6] The claims in the instant case that the supervisory and training practices were constitutionally defective may be difficult to prove. Such claims are rarely successful on the merits. *E.g., Orpiano v. Johnson*, 632 F.2d 1096 (4th Cir. 1980); *Turpin v. Mailet*, 619 F.2d at 201. *However*, it cannot now be determined whether plaintiffs will be able to produce sufficient evidence of knowledge, acquiescence or indifference so as to prevail on the merits.

1246; *Smith v. Ambrogio*, 456 F.Supp. 1130, 1136 (D. or deliberate failure to discipline subordinates in the face Conn.1978). A police chief or his lieutenant's persistent or deliberate failure to discipline subordinates in the face of knowledge of their propensity for improper use of force constitutes a *de facto* policy or official custom actionable under § 1983. *Sims v. Adams*, 537 F.2d 829 (5th Cir.1976); *Moon v. Winfield*, 383 F.Supp. 31 (N.D. Ill.1974).

Upon review of plaintiff's complaint, the court holds plaintiff has sufficently alleged claims of a failure to investigate and discipline on the part of defendants Dalton, Holman, Johnson, Dixon and Smith, so as to defeat defendants' 12(b)(6) motion.[7]

Therefore, based on the aforesaid, the court concludes plaintiff has stated a cognizable claim against the supervisory defendants under § 1983. Defendants' motion to dismiss as to plaintiff's claims against defendants Holman, Dalton, Johnson, Dixon and Smith is DENIED.

C. *Good Faith Immunity*

Defendants' final contention is that they are entitled to qualified good faith immunity pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The court disagrees.

In *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 68 L.Ed.2d 673 (1980), the Supreme Court unequivocally held that a good faith immunity defense is not available to municipalities in a § 1983 suit. The court found its conclusion compelled both by the legislative purpose in enacting § 1 of the Civil Rights Act and by strong considerations of public policy. *Id* at 650; 100 S.Ct. at 1415.

Additionally, because an official capacity suit, such as the instant case, merely represents another form of claim

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[7] Footnote 5 is equally applicable to these claims.

against the municipality itself, the *Owen* holding denying a good faith immunity defense has been universally extended to official capacity suits. *Hughes v. Blankenship*, 672 F.2d 403 (4th Cir.1982); *Kincaid v. Rusk*, 670 F.2d 737 (7th Cir.1982); *Universal Amusement Co. v. Hofheinz*, 646 F.2d 996 (5th Cir.1981); *Key v. Rutherford*, 645 F.2d 880 (10th Cir.1981). Qualified good faith immunity insulates government officials only from liability in an individual capacity, but has no effect on liability in an official capacity, regardless of the benign intentions of the officers. *Unidas v. Briscoe*, 619 F.2d 391, 403 (5th Cir.1980).

Thus, defendants Dalton, Holman, Johnson, Dixon and Smith, sued in their official capacity, may not assert good faith immunity as a defense in this action. Defendant City of Fayetteville and the supervisory defendants' motion to dismiss on the basis of qualified immunity is DENIED.

(4). DEFENDANTS HOLMAN AND JOHNSON'S MOTION FOR SUMMARY JUDGMENT

Defendants allege no new grounds in support of their motion for summary judgment. Three two-paragraph affidavits are attached to the motion stating, in conclusory terms, that neither defendant was in the chain of command nor had any supervisory responsibility for defendant McDaniel on November 19, 1983.

Defendants' motion for summary judgment is premised, as was their motion to dismiss, on an erroneous interpretation of plaintiff's complaint. Plaintiff is not alleging liability on the basis of *respondeat superior*. Spell alleges liability based on defendants' own actions and omissions as they relate to and form the basis of the custom, policy and practice of the municipality.

First, with regard to defendant Holman, plaintiff alleges in his verified complaint, upon which he may rely,

that Holman indeed had general supervisory powers and responsibilities over individual police officers, including McDaniel. Liability is premised on Holman's failure to train, supervise and discipline McDaniel and others on the force under his command, thereby creating the conditions which proximately caused the constitutional deprivation at issue in this litigation. Genuine issues of material fact appearing in this sole issue raised by defendant Holman's motion, summary judgment is improper.

As to defendant Johnson, the fact that he is not in the chain of command or in a direct supervisory position over McDaniel is irrelevant. Defendant admits he was, in fact, in charge of Departmental Inspections as plaintiff alleged in his complaint. *See* affidavit of William C. Johnson, filed March 13, 1984. Liability is premised on Johnson's failure to investigate allegations of police misconduct and abuse, as his job required him to do, thereby creating the conditions which proximately caused plaintiff's injury. Again, genuine issues of material fact remaining, summary judgment is inappropriate. Therefore, defendants' motion for summary judgment is DENIED.

(5). PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Plaintiff moves to strike paragraphs 2, 4, 6 and 7 of the defendant City and supervisory defendants' Affirmative Defenses pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Plaintiff alleges they constitute insufficient defenses as a matter of law. Paragraphs 2, 4 and 6 contain defendants' assertion of their qualified good faith immunity defense. Paragraph 7 contains defendants Holman and Johnson's assertion of immunity because they were not in the chain of command over defendant McDaniel. Paragraph 7 further contains defendants Dalton, Dixon and Smith's assertion of absolute immunity on the basis that their actions were benign

and discretionary. The court has previously addressed the merits of these contentions and denied motions to dismiss and for summary judgment predicated upon them. The issue now is whether to strike the defenses from defendants' Answer.

Under Rule 12(f) of the Federal Rules, the court may strike "from any pleading any insufficient defense." The striking of such defenses is a proper means of expediting legal proceedings. *See, e.g.; United States v. 416.81 Acres of Land*, 514 F.2d 627 (7th Cir.1975); *Klemens v. Air Line Pilots Association International*, 500 F.Supp. 735 (W.D.Wash.1980). A defense is insufficient "if it is clearly invalid as a matter of law." *Anchor Hocking Corp. v. Jacksonville Electric Authority*, 419 F.Supp. 992, 1000 (M.D.Fla.1976).

A motion to strike is a severe measure and it is generally viewed with disfavor, because it is difficult to establish that a defense is clearly insufficient. However, when such a showing is made, the court should grant a motion to strike "to avoid unnecessary time and money in litigating invalid, spurious issues." *Id., Johnson v. American Airlines, Inc.*, 487 F.Supp. 1343 (N.D.Tex.1980).

Here, even accepting as true the facts alleged by defendants as the basis for their immunity defenses, defendants' Second, Fourth, Sixth and Seventh Affirmative Defenses are clearly insufficient as a matter of law. Accordingly, plaintiff's motion to strike is GRANTED and the Clerk of Court is DIRECTED to strike the Second, Fourth, Sixth and Seventh Affirmative Defenses from the copy of defendants' Answer, filed March 13, 1984.

(6). DEFENDANT CITY OF FAYETTEVILLE'S MOTION TO STRIKE PLAINTIFF'S PUNITIVE DAMAGES CLAIM

Defendant moves to strike paragraph (3) of the prayer for relief contained in plaintiff's complaint pursuant to F.R.Civ.P. 12(f). Paragraph (3) prays for punitive

damages against the defendant City in the amount of $2,500,000.

The problem with defendant's motion is that Rule 12 (f) only permits the striking of insufficient defenses or redundant, immaterial, impertinent or scandalous matter. Plaintiff's prayer for punitive damages falls within none of the above categories. A motion to strike is neither the authorized nor the proper way to procure the dismissal of part of a complaint. *See* 5 Wright and Miller, *Federal Practice & Procedure* § 1380 (1969).

However, since plaintiff has responded to defendant's motion, he can hardly be prejudiced by the court, *sua sponte*, treating defendant's inaccurately denominated motion to strike as a Rule 126(b)(6) motion to dismiss plaintiff's claim for punitive damages against the municipality.

Defendant argues that pursuant to the Supreme Court's recent pronouncement in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), punitive damages are not recoverable against a municipal defendant in a § 1983 action. The court agrees. *Newport* is unequivocal and, contrary to plaintiff's argument, is not limited to its facts: In sweeping language, the court states:

> Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extensive conduct . . . [A]n award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor

> justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

Id. at 267-68, 101 S.Ct. at 2759. More specifically, the court held:

> In sum, we find that considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages obtained at common law and was undisturbed by the 42nd Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.

Id. at 271, 101 S.Ct. at 2762.

In accordance with Supreme Court dictate, defendant's motion to dismiss plaintiff's punitive damages claim against the City of Fayetteville is GRANTED.

(7). PLAINTIFF'S MOTION TO COMPEL DISCOVERY [8]

On January 26, 1984, plaintiff served on defendants a Request for Production of Documents pursuant to Rule 34 of the Federal Rules of Civil Procedure. Plaintiff requested thirteen categories of documents. With the exception of one item, defendants have refused to accede to plaintiff's request for discovery. Plaintiff, in accordance with the requirements of F.R.Civ.P. 34 and 37 moves this court for an order compelling discovery. In support of his motion, plaintiff has filed an extensive affidavit of counsel and memorandum of law. Defendant continues to object to the discovery and has filed a concomitant

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[8] Plaintiff's motion is directed to the supervisory defendants and the City, not McDaniel.

motion for a protective order. Defendants' objections are supported by a conclusory three page memorandum with no attached affidavit, thus making more difficult this court's task of deciding the complex issues presented. Plaintiff essentially seeks three types of information in his discovery request: (1) records of complaints, investigations and reports concerning the incident at bar and defendant McDaniel's conduct while a member of the Fayetteville Police Department;[9] (2) records of complaints filed, investigations conducted and reports written for internal and external use, allegations of abuse and unreasonable force within the Fayetteville Police Department since January 1, 1981;[10] and (3) regulations, directives, manuals, official administrative reports and other documents produced by or for the Police Department and used by it to communicate departmental policies or rules of law to officers regarding the use of force.[11]

Plaintiff asserts that the discovery he seeks is essential to the preparation of his case for trial and that the requests fall squarely within the scope of the discovery rules.

Defendants, on the other hand, have interposed a variety of objections to the discovery. Defendants argue the following grounds support their motion for a protective order: (1) irrelevance; (2) executive privilege (although it is not specifically delineated as such); (3) state statutory privilege under N.C.Gen.Stat. § 160A-168; (4) work product privilege; (5) attorney-client privilege; and (6) undue hardship. After a thorough review of plaintiff's motion, affidavit of counsel and memorandum of law and defendants' objections thereto, the

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[9] Request Nos. 2, 7, 9 and 12 are included in this category.

[10] Request Nos. 3, 4, 5, 6, 8, 10, 11 and 13 are included in this category.

[11] Request No. 1 forms the basis of this category and the court finds defendant has substantially complied with this request.

court GRANTS plaintiff's motion to compel on the following basis with limited exceptions as detailed in a protective order issued at the conclusion of this discussion.

A. *Relevance*

Defendants object to all of plaintiff's requests on the grounds that they are not relevant to the subject matter involved in the pending action as required by Rule 26(b)(1) of the Federal Rules of Civil Procedure.

Rules 26 through 37 of the Federal Rules have been interpreted liberally to allow maximum discovery. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). It is clear that what is relevant in discovery is far different from what is relevant at trial, in that the concept at the discovery state is much broader. *See* C. Wright, *Law of Federal Courts* 403 (1976). Discovery is designed to define and clarify the issues. If requested materials are reasonably calculated to lead to discovery of admissible evidence, the discovery request is relevant. F.R.Civ.P. 26(b)(1); *Weddington v. Consolidated Rail Corp.*, 101 F.R.D. 71, 73 (N.D.Ind.1984). *Alliance to End Repression v. Rockford*, 75 F.R.D. 441, 444 (N.D. Ill.1977). Therefore, discovery requests should be complied with if there is a reasonable possibility that the information sought may be relevant to the subject matter of the action. *Sherman Park Community Association v. Wauwatosa Realty*, 486 F.Supp. 838, 845 (E.D.Wis. 1980).

Furthermore, the burden of showing that the requested discovery is not relevant to the issues in this litigation is clearly on the party resisting discovery. *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C.1978); *Zucker v. Sable*, 72 F.R.D. 1, 3 (S.D.N.Y.1975). With this definition of relevance kept firmly in mind, the court will now address defendants' relevancy objections to the major categories of production requests.

First, with regard to defendants' objection to material directly related to this incident and to McDaniel, the court finds the objection of little merit. Information from investigations into the incident which forms the basis for this lawsuit and into the background of the allegedly culpable individual is by definition highly relevant to this lawsuit. *Wood v. Breier*, 54 F.R.D. 7 (E.D. Wis.1972). Items 2, 7, 9 and 12 are clearly relevant to show the propensity of McDaniel to repeatedly use excessive or unreasonable force. The items are also relevant to show the supervisory defendants knew or should have known of such propensity on McDaniel's part. *Dos Santos v. O'Neill*, 62 F.R.D. 448 (E.D.Pa.1974). Finally plaintiff argues the information contained in these requests will establish that previous allegations against McDaniel were presented to City officials prior to this incident and City officials refused to take adequate remedial steps. The court finds items 2, 7, 9, and 12 relevant and defendants' objection is OVERRULED.

Defendants' relevancy objection to material relating to all other incidents of misconduct and abuse since January 1, 1981, although requiring slightly more discussion, is also without merit. Plaintiff claims this information is relevant to demonstrate a repetitive pattern of violent behavior and unreasonable use of force by numerous Fayetteville police officers. In addition, plaintiff contends the information will show that the supervisory defendants knew or should have known of this pattern of assaultive behavior and failed to take reasonable steps to investigate and prevent it. The infomation is critical, plaintiff argues, if he is to have any chance of success on his claim of municipal liability. The court agrees.

Under § 1983, the extent of supervisors' knowledge of and participation in the acts of their subordinates determines the scope of their liability and *ipso facto* the

municipality's liability. The essence of plaintiff's complaint is that the supervisory defendants were grossly negligent or deliberately indifferent in failing to provide adequate training, supervision and discipline to officers on the police force, including McDaniel. To prove this allegation, the court agrees with plaintiff that it would be high relevant, indeed critical, to establish what the defendants knew regarding allegations of police brutality and when they knew it. *See Culp v. Devlin*, 78 F.R.D. 136 (E.D.Pa.1978); *Norton v. McKeon*, 444 F.Supp. 384 (E.D.Pa.1977). Neither plaintiff nor defendants suggest any other source for information which would shed light upon the supervisory defendants' possible knowledge and concomitant responsibility in this case.

The basic problem with defendants' objection is that it fundamentally disregards the theories underlying plaintiff's case. *Culp v. Devlin*, 78 F.R.D. at 141. Therefore, on relevancy grounds this court agrees with the vast majority of courts which have considered the issue and OVERRULES defendants' objections. *See, e.g., Mercy v. County of Suffolk*, 93 F.R.D. 520 (E.D.N.Y.1982); *Dykes v. Morris*, 85 F.R.D. 373 (N.D.Ill.1980); *Dos Santos v. O'Neill*, 62 F.R.D. at 451; *Crawford v. Dominic*, 469 F.Supp. 260 (E.D.Pa.1979); *Wood v. Breier*, 54 F.R.D. at 13.

B. *Executive Privilege*

Executive privilege is the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest. *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 342 (E.D.Pa.1973). Defendants contend that the documents at issue in this case should be protected by executive privilege because disclosure of their contents would frustrate the public policy served by internal and municipal police investigations. Defendants argue, as have many municipal defendants in previous cases, that investigations of allega-

tions of abuse are conducted under a veil of confidentiality and it would impair the functioning of the police department if the results of such investigations were disclosed to the public. *See, e.g.*; *Dos Santos v. O'Neill*, 62 F.R.D. at 449; *Frankenhauser v. Rizzo*, 59 F.R.D. at 342. Defendants also claim the disclosure would chill the willingness to give information during police investigations and would, therefore, "impede candid and conscientious self-evaluation of actions of the department." *Id.* Although formal objections on the grounds of executive privilege were not tendered by defendants, the court reasonably interprets defendants' relevancy arguments to contain such objections as to all plaintiff's requests.

Initially, the court notes that the party objecting to discovery on the basis of any privilege has the burden of establishing the existence of that privilege. *Robinson v. Magovern*, 83 F.R.D. 79, 85 (W.D.Pa.1979); *Reeg v. Fetzer*, 78 F.R.D. 34 (W.D.Okl.1976) Evidentiary privileges operate to exclude relevant information from the fact finder and thus are not favored The Supreme Court in addressing the general issue of evidentiary privileges has stated: "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974). The law will sustain a claim of privilege only when absolutely necessary to protect and preserve an interest of significant public importance that the asserted privilege is designed to serve. *United States v. Mandel*, 415 F.Supp. 1025 (D.Md.1976). As applied to this § 1983 action, the court holds a claim that relevant evidence is privileged "must be so meritorious as to overcome the fundamental importance of a law meant to insure each citizen from unconstitutional state action." *Wood v. Breier*, 54 F.R.D at 13; *Crawford v. Dominic*, 469 F.Supp.at 262.

Thus, courts which have been faced with the defense of executive privilege have recognized that it is not an absolute privilege. *See e.g.; Dos Santos v. O'Neill*, 62 F.R.D. at 449; *Wood v. Breier*, 54 F.R.D. at 11. It must be demonstrated on a case by case basis by performance of a balancing function. Only if the damage to the executive department or the public interest from disclosure significantly outweighs the harm to plaintiffs from nondisclosure will the privilege be upheld. *Id.*

The court's balancing function requires discussion of a number of competing factors. The fullest categorization of the factors to be considered in deciding what police files should be discoverable by a § 1983 plaintiff was made by Judge Becker in *Frankenhauser v. Rizzo.* Judge Becker stated:

> In the context of discovery of police investigation files in a civil rights case, however, at least the following considerations should be examined: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which government self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whehter the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other

discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

59 F.R.D. at 344.

Frankenhauser has been widely followed. *See, e.g., Culp v. Devlin*, 78 F.R.D. 136 (E.D.Pa.1978); *Jabara v. Kelley*, 75 F.R.D. 475 (E.D.Mich.1977); *Gaison v. Scott*, 59 F.R.D. 347 (D.Haw.1973); *Boyd v. Gullett*, 64 F.R.D. 169 (D.Md.1974). Applying the criteria set forth in *Frankenhauser* to the case at bar, the court finds plaintiff has met the test outlined by Judge Becker and defendants' objections based on executive privilege are OVERRULED, with the exception of three instances delineated below.

First, this court does not believe that the infrequent instances of court-ordered disclosure made after considered application of a detailed balancing test would deter citizens from revealing information to the police. Neither does the court perceive any impact upon private citizens who openly and voluntarly gave statements surrounding an investigation of an allegation of police misconduct. *Frankenhuser v. Rizzo*, 59 F.R.D. at 344. The average citizen is generally willing to cooperate with law enforcement officials in this regard. In addition, the court will issue a protective order strictly limiting access to the information and documents produced to those members of the plaintiff's litigation team and experts employed by plaintiff's counsel.

However, the court does perceive a potential problem with information contained in police files from *confidential informants*. The public interest in preserving the anonymity of such persons, whose effectiveness and perhaps whose lives may be at risk, may justify the decision of identifying information from the reports, files and documents sought in discovery, at least insofar as these documents relate to incidents other than the

alleged assault on Spell and police officers other than defendant McDaniel. *Jabara v. Kelley*, 75 F.R.D. at 495; *Crawford v. Dominic*, 469 F.Supp. at 264. Therefore, the court will issue a protective order in this regard and will require an *in camera* inspection of documents within this category identified in *good faith* by counsel for defendants under the terms and conditions set forth at the conclusion of this discussion.[12]

With regard to the third factor, the court simply does not accept the proposition that fellow police officers are more likely to be untruthful if they know potential plaintiffs might receive their reports in later litigation. *Id.* at 264-65. The court recognizes the importance of police department self-evaluation and remedial action, but disclosure to plaintiff's counsel in a limited number of cases will not hinder internal review. On the contrary, limited disclosure should further this policy. As Judge Pratt has eloquently stated in *Mercy v. County of Suffolk*:

> These investigations are conducted, at taxpayer expense, to determine whether the procedures of the department or individual police officers were responsible for the complained-of incident, and whether disciplinary or other remedial action is necessary to prevent the recurrence of similar incidents. No legitimate purpose is served by conducting the investigations under a veil of near-total secrecy. Rather, knowledge that a limited number of persons, as well as a state or federal court, may examine the file in the event of civil litigation may serve to insure these investigations are carried out in an even-handed manner, that the statements are carefully

[12] The court notes and considers extremely important the fact defendants have not alleged the existence of any confidential informants in their motion or memorandum opposing production. The court, therefore, does not expect many documents to legitimately fall within this exception.

> and accurately taken, that that the true facts come to light. . ."

93 F.R.D. at 522.

As with relevance, a basic problem with defendants' objection on this basis is that it disregards a major premise of plaintiff's case. Plaintiff alleges this exact process of internal review was grossly inadequate. Defendant Johnson, and therefore the City, is specifically charged with being deliberately indifferent to citizen and fellow police officers' allegations of misconduct by failing to properly investigate such charges. Accusations of failure to discipline and active encouragement of assaultive behavior abound in plaintiff's complaint. In order for plaintiff to prove these allegations, he must have an opportunity to discover and review internal investigative files and reports. *See Dykes v. Morris*, 85 F.R.D. at 375-6 (N.D.Ill.1980); *Dos Santos v. O'Neill*, 62 F.R.D. at 451.[13]

Defendants also implicitly argue that some of the materials plaintiff seeks should be suppressed because they contain supervisory evaluations of the conduct of the officers involved. However, to apply a *per se* rule exempting supervisory evaluations from discovery would probably bar scrutiny of highly relevant evidence which cannot be adequately developed in any other way. *Crawford v. Dominic*, 469 F.Supp. at 265. In a § 1983 custom and practice case such as this, internal supervisory evaluations may be the best evidence available of the state of mind of defendant supervisors and of other agents of the municipality and police department responsible for personnel and policy decisions. *Id.* Such evaluations

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[13] The court finds plaintiff's request for documents since January 1, 1981 reasonably limited in time and scope. However, the court hereby establishes a *forward cut-off date* of January 26, 1984, the date of plaintiff's complaint.

are clearly relevant to determining what the defendants knew and when they knew it.

For these reasons, the court is persuaded that supervisory evaluations should not be shielded or edited unless, as to each such assertedly privileged evaluation, defendants can make a strong showing that confidentiality is vital to the decision-making process of the municipality or would otherwise substantially harm the public interest. *Id.*, *Boyd v. Gullett*, 64 F.R.D. at 178; *Dos Santos v. O'Neill*, 62 F.R.D. at 451. The court will issue a protective order in this regard and will require an *in camera* inspection of documents within this category identified in *good faith* by counsel for defendants only insofar as the documents relate to incidents other than the one at bar and police officers other than defendant McDaniel (i.e. Request Nos. 3, 4, 5, 6, 8, 10, 11 and 13).[14]

As to factor five, plaintiff is not an actual or potential defendant in any pending criminal proceeding arising out of this case. Neither does it appear that any departmental disciplinary actions have been instituted against any defendant as a result of the events in question.

Further, defendants do not allege that any ongoing police investigation will be disrupted by disclosure. However, should defendants find this to be the case investigatory files relating to internal investigations currently in progress from incidents arising prior to January 26, 1984, may properly be withheld by defendants until such time as the investigation is completed. *Boyd v. Gullett*, 64 F.R.D. at 178; *Frankenhauser v. Rizzo*, 59

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[14] The court will impose strict conditions in the protective order on the manner in which the privilege may be asserted. The court does not expect every evaluation since 1981 nor a majority of them to be delivered to its doorstep. Counsel for defendants shall exercise this privilege with great care and only in exceptional circumstances. An abuse of this right to *in camera* inspection will result in severe and immediate sanctions.

F.R.D. at 343.[15] At the conclusion of the investigation, which should be accomplished at this late date with prompt dispatch, defendants will have a continuing obligation to supplement plaintiff's production request with those documents as ordered by this court.

As to the final three factors of the *Frankenhauser* test, all clearly favor the plaintiff. Plaintiff's allegations are substantial and brought in good faith. The information requested is simply not available through other discovery or from other sources. Finally, the importance of the information sought is, by now, manifest and overriding. See *Crawford v. Dominic*, 469 F.Supp. at 263 (holding that the weightiest of the ten factors is the last: the importance of the information to the plaintiff's case); *Culp v. Devlin*, 78 F.R.D. at 139-41.

In conclusion, the court finds the scale tip decidely in favor of the plaintiff and defendants' objections to disclosure on the grounds of executive privilege are OVERRULED with the exception of those items previously discussed and further detailed in the protective order issued at the conclusion of the court's memorandum on plaintiff's motion to compel.

C. *North Carolina Statutory Privilege*

Defendants' assertion that N.C.Gen.Stat. § 160A-168 prohibits disclosure of items 2-10 and 12 can be disposed of quickly. § 160A-168 deems confidential most information contained in city employee's personnel file with certain exceptions.[16] One of the exceptions, 160A-168(c)(4),

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[15] Defense counsel shall inform plaintiff of the nature of any documents withheld on this basis with sufficient particularity so as to enable plaintiff to file objections with this court should he deem the decision to withhold as taken in bad faith.

[16] The court has found no North Carolina decision interpreting the breadth and scope of this statute, although the court finds that whatever privilege may be asserted on the basis of the statute, it is

specifically allows disclosure of the entire file by order of a court of competent jurisdiction. This court has meticulously considered defendants' relevancy and executive privilege objections and found the documents requested generaly discoverable. Defendants offer no additional justification for invoking the North Carolina privilege. Therefore, given that the statute itself confers authority on this court to order disclosure, the court, in its discretion, OVERRULES defendants' objection of statutory privilege.

In addition, the court notes that the North Carolina law of privileges is not decisive because the present action arises under federal law. In a non-diversity case, federal privilege law applies. *See* F.R.Evid. 501; *Flora v. Hamilton*, 81 F.R.D. at 578; *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (N.D.Cal.1978). Under federal law, there is no privilege for police investigative files other than to files relating to ongoing investigations. *See Swanner v. United States*, 406 F.2d 716 (5th Cir.1969); *Alexander v. Rizzo*, 50 F.R.D. 374 (E.D.Pa.1970); *Capitol Vending Co. v. Baker*, 35 F.R.D. 510 (D.D.C.1964). Therefore, on this basis as well defendants' state law objections are OVERRULED.

D. *Work-Product Privilege*

Defendants' next argument is that the material contained in items 2, 5, 6, 9, 10 and 13 fall within the work product privilege. The court is at a loss to see how this information can be classified as work product.

Item 2 requests complaints filed by civilians and fellow police officers against defendant McDaniel.[17] Item 5 re-

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not an evidentiary privilege. Such privileges are exclusively listed in N.C.Gen.Stat. § 8-53—§ 8-53.5.

[17] Request Nos. 2 and 9 relate to documents concerning only defendant McDaniel. McDaniel has not filed any objection to the production of such documents.

quests records concerning disciplinary actions taken against police officers as a result of allegations of unreasonable force. Item 6 requests releases from liability signed by complainants. Item 9 requests records of any Internal Affairs investigations of defendant McDaniel and Item 10 requests similar information regarding all investigations conducted since January 1, 1981 by the Internal Affairs Division.

Rule 26(b)(3) of the Federal Rules of Civil Procedure contains the work product doctrine. It allows a party to "obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Defendants' assertion of the work-product privilege fails for three reasons.

First, the reports requested were, for the most part, prepared pursuant to the normal police practices of conducting an internal investigation after a complaint is filed, *Mercy v. County of Suffolk*, 93 F.R.D. at 522. Investigations of this nature are routinely undertaken by police departments and are not conducted in anticipation of trial. *Frankenhauser v. Rizzo*, 59 F.R.D. at 342, n. 5. Defendants do not allege any specific document was prepared in anticipation of litigation and it was their burden to have so pled.[18] The mere possibility of litigation is insufficient to allow the documents Rule 26(b)(3) protection and to prevent disclosure.

Second, plaintiff alleges the materials are primarily factual accounts of the events at issue in this litigation.

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[18] Defendants simply cannot rely on a conclusory allegation of work-product privilege without any attempt to justify the assertion.

Defendants do not dispute this assertion. To the extent plaintiff is correct, facts are not protected by the work-product privilege. Moreover, defendants do not assert the materials contain any evidence of counsel's legal analysis, theories of the case, or anticipated strategy should litigation ensure. Therefore, this court has no alternative but to conclude that the reports and documents at issue were prepared in the ordinary course of business pursuant to the Internal Affairs Division's duty to investigate allegations of abuse, and as such are not shielded from discovery. *See e.g., Mercy v. County of Suffolk*, 93 F.R.D. at 522; *Diamond v. City of Mobile*, 86 F.R.D. 324, 328-29 (S.D.Ala.1978); *Dos Santos v. O'Neill*, 62 F.R.D. at 451.

Finally, and most importantly, the court holds that even if the documents are within the parameters of Rule 26(b)(3), plaintiff has clearly established "substantial need" for the information and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Therefore, defendants' objections premised upon the work-product privilege are OVERRULED.

E. *Attorney-Client Privilege*

Defendants contend that the same documents they listed under work-product privilege would also violate the attorney-client privilege if disclosed. Defendants' conclusory assertion is without merit.

The investigative reports and certainly the complaints and releases of liability are "not part of the consultation process between lawyer and client or among representatives of the client designed to facilitate the rendition of legal services to the client." *Frankenhauser v. Rizzo*, 59 F.R.D. at 342, n. 4. Defendants simply have not alleged that at any time of these investigations, any of the participants had any communications with an attorney. In deciding this same issue and denying defendants' mo-

tion for a protective order, Judge Pratt stated in *Mercy v. County of Suffolk*:

> . . . the underlying facts involved in these communications are not privileged, and a party cannot refuse to testify to facts merely because he later communicated them to his lawyer. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 686, 66 L.Ed.2d 584 (1981). As to the communication of these facts, such communications are protected by the privilege only when they are between attorneys and their clients . . . The central purpose of internal affairs' investigation was to determine within the administrative procedures of the police department whether any disciplinary action should be taken against certain police officers . . . The "communications" in each instance were not between attorney and client, but between one police officer and another [or between a citizen and a police officer] who was carrying out an investigative function. None of the policies underlying the attorney-client privilege would be served by preventing disclosure here. Therefore, neither the individual police officers' reports nor the narrative report of the investigating officer falls within the attorney-client privilege.

93 F.R.D. at 522.

For the reasons cited by Judge Pratt, defendants' objections are OVERRULED.

F. *Undue Hardship*

Defendants' final argument with respect to Items 3, 8, 10 and 12 is that to *provide copies* of the same would place upon them an undue burden and expense. Plaintiffs agrees with defendant and in his response states that he will copy all of the requested documents and do so at his own expense. Therefore, defendants' argument is moot as they will incur no burden or expense what-

soever. On the basis of plaintiff's assertion, defendants' objection is OVERRULED.

ORDER

Based upon the foregoing, plaintiff's motion to compel the production of documents is GRANTED and defendants' motion for a protective order is GRANTED in part and DENIED in part upon the following terms and conditions:

1. Defendants shall, within ten (10) days of the date of service of this order, produce to the plaintiff for inspection and copying all materials and documents requested in Items 2, 7, 9 and 12 of plaintiff's Request for Production of Documents without exception.

2. Defendant shall, within twenty (20) days of the date of service of this order, produce to the plaintiff for inspection and copying all materials and documents requested in Items 3, 4, 5, 6, 8, 10, 11, and 13 of plaintiff's Request for Production of Documents with the following exceptions:

(a) Investigatory files related to internal investigations currently in progress regarding incidents arising prior to January 26, 1984, may be withheld until such time as the investigation is completed. At the conclusion of the investigation, defendants shall produce said documents to the plaintiff for inspection and copying. Defense counsel shall notify counsel for plaintiff of the nature of any documents withheld on this basis by August 5, 1984. *See* footnote 15 *supra.*

(b) Investigatory files and internal Police Department documents which defendants reasonably and in good faith allege contain identifying information from confidential informants may be withheld. Any documents so identified shall be delivered by defendants, under seal, to the Clerk of Court, Fayetteville, North Carolina, by August

5, 1984, to be immediately forwarded to this court for *in camera* inspection. At that time the court will decide whether the document should be discovered, discovered in modified form with identifying information deleted or wholly protected from disclosure to plaintiff.

(c) Material from investigatory files and internal Police Department documents which defendants reasonably and in good faith allege contain policy recommendations, personnel evaluation, official criticisms or opinions of supervisory personnel may be withheld. With regard to any document so withheld, defendants shall be in a position to make a strong showing that exceptional circumstances exist mandating suppression of the document because confidentiality in this instance is vital to the decision-making process of the municipality or disclosure would otherwise substantially harm the public interest. *See* footnote 14, *supra.* The court expects this assertion of privilege to be used in a limited, thoughtful and extremely discriminating manner. Any documents so identified shall be delivered by defendants, under seal, to the Clerk of Court, Fayetteville, North Carolina, by August 5, 1984, to be immediately forwarded to this court for *in camera* inspection. At that time the court will decide whether the document should be discovered, discovered in modified form or wholly protected from disclosure to plaintiff based upon the principles enunciated in this opinion.

3. If defendants wish to advance a claim of privilege as to material listed in 2(b) or 2(c), the claim should be addressed *with particularity* to *each* document as to which defendants assert an entitlement not to disclose, and shall as to each document state a detailed reason for asserting the privilege. Each document delivered to the court for *in camera* inspection shall be marked for identification purposes and defendants shall submit a summary list of all documents delivered to the court with their appropriate identification numbers.

4. A back cut-off date of January 1, 1981, and a forward cut-off date of January 26, 1984, are established for purposes of this order on discovery.

5. Inspection and access to the documents and materials produced by defendants shall be absolutely limited to plaintiff's counsel and such persons as may be employed by plaintiff's counsel in connection with the plaintiff's preparation for trial or hearings in this matter. Plaintiff shall not disclose the contents of the documents and materials to any persons other than those described except by order of this court.

6. The parties are not to bring any disputes with respect to the requirements of this order before the court without an accompanying affidavit certifying the parties have conferred and attempted in good faith to resolve the dispute.

7. Counsel are expected to fully comply with this order. The court will impose severe and immediate sanctions in the event of non-compliance.

8. Defendants' motion to strike paragraph (2) of the prayer for relief contained in plaintiff's motion to compel is ALLOWED. Although the court disagrees with defendants' objections to the production of documents, as heretofore indicated, the court does not find those objections to be frivolous or made in bad faith. Therefore, the Clerk of Court is directed to STRIKE paragraph (2) of the prayer for relief contained in plaintiff's Motion to Compel Compliance with Request for Inspection, filed March 20, 1984.

9. Plaintiff's motion for attorneys' fees in conjunction with his motion to compel is STAYED pending the outcome of this litigation.

SUMMARY

In conclusion, it is ORDERED that:

(1) the motion of plaintiff to amend his complaint is GRANTED and counsel for plaintiff is ALLOWED five (5) days from the date of service of this order to file plaintiff's amended complaint;

(2) the motion of defendant McDaniel to dismiss plaintiff's complaint is DENIED;

(3) the motion of defendants Dalton, Holman, Johnson, Dixon, Smith and City of Fayetteville to dismiss plaintiff's complaint is DENIED;

(4) the motion of defendants Holman and Johnson for summary judgment in DENIED;

(5) the motion of plaintiff to strike defendants' Second, Fourth, Sixth and Seventh Affirmative Defenses is GRANTED and the Clerk of Court is directed to strike said Affirmative Defenses from the copy of defendants' Answer, filed March 13, 1984;

(6) the motion of defendant City of Fayetteville to dismiss plaintiff's punitive damages claim against the City is GRANTED;

(7) the motion of plaintiff to compel production of documents is GRANTED and defendants' motion for a protective order is GRANTED in part and DENIED in part upon the terms and conditions previously described.

SO ORDERED.

CHARGE TO THE JURY

[9] Now, Ladies and Gentlemen, you will decide the plaintiff's case in separate phases. The first, as to the defendant McDaniel. And the second, as to the remaining defendants Smith, Dixon, Dalton, Holman and Johnson as supervisory officials of the Fayetteville Police Department.

Your decision, as to said supervisory officials, will in turn determine the liability, if any, of the City of Fayetteville.

The plaintiff in this case claims damages for per-
[10] sonal injuries alleged to have been suffered or sustained by him as the result of the deprivation under color of state and municipal law, statute, custom, practice or usage of a right, privilege and immunity secured to the plaintiff both by the Constitution of the United States and by an Act of Congress providing for the equal rights of all persons within the jurisdiction of the United States.

Specifically, plaintiff alleges that on November 19, 1983, the defendant Charles D. McDaniel was a duly appointed employed and acting police officer of the City of Fayetteville Police Department. And on that date, within the City of Fayetteville, the defendant Charles D. McDaniel, while acting as a police officer under color of the laws of the State of North Carolina and the ordinances of the City of Fayetteville and the rules and regulations of the Police Department of the City of Fayetteville, did knowingly subject the plaintiff to the deprivation of rights and privileges secured and protected to him by the Constitution and laws of the United States, namely the right of physical integrity to be free from unlawful detention and to be properly cared for and treated as established by the substantive due process provisions of the Fourteenth Amendment, and further the right to be free from unreasonable seizure as established

by the Fourth Amendment and the Fourteenth Amendment.

* * * *

[11] The plaintiff further alleges that the actions of the defendant McDaniel is assaulting him on November 19, 1983 were taken pursuant to, consistent with, under color of and proximately resulted from de facto policy practices, customs or procedures caused, maintained, tacitly encouraged or condoned by one or more supervisory officials of the defendant City of Fayetteville.

I shall further instruct you as to the meaning of de facto later in these instructions.

The plaintiff alleges that the supervisory defendants namely John P. Smith, as City Manager; Daniel K. Dixon, Chief [12] of Police; Command Sergeant William Dalton; Command Sergeant Roger T. Holman; and Internal Affairs Sergeant William Johnson, all acting under color of state and municipal law and pursuant to the authority of their offices within the defendant and pursuant to the authority of their offices with the defendant City of Fayetteville, by their respective actions or inaction, proximately caused the defendant Charles D. McDaniel to assault the plaintiff on November 19, 1983.

Therefore, the plaintiff seeks to hold these defendants, and through one or more of them, the City of Fayetteville, jointly liable with the defendant Charles D. McDaniel for his actual or compensatory damages.

The defendants Smith, Dixon, Dalton, Holman and Johnson have been joined in this matter only in their capacity as duly authorized representatives of the defendant City of Fayetteville. Thus, any judgment rendered against these representative defendants will not subject any of them to individual liability for payment thereof.

Allowing municipal officials to be sued in their representative capacities is simply another means of holding a municipal authority responsible for the acts of its officials, while at the same time allowing the jury to affix responsibility toward particular public officials.

Thus, the plaintiff seeks to hold these supervisory defendants jointly liable in their representative capacities [13] with the defendant Charles D. McDaniel for plaintiff's actual or compensatory damages.

* * * *

[19] In this respect, I charge you that the law provides that local governmental bodies such as the defendant City of Fayetteville are held jointly liable for money damages where it is alleged and found by a preponderance of the evidence that the unconstitutional action of its employees, servants or agents proximately resulted from de facto regulations, policies, customs or practices of the defendant city, or an agency of the city, such as in this case, the Fayetteville Police Department.

The law further allows municipal or city officials to be held liable for constitutional violations which proximately result from their actions or inactions which constitute gross negligence or wilful indifference in the performance of their official duties as representatives of a city such as the defendant City of Fayetteville.

I further charge you that this is so even if those officials use good faith in the performance of their duties. Thus, if their actions or inactions in carrying out their [20] official duties amount to gross negligence in allowing a de facto or official policy to exist or wilful indifference thereto, these officials may be held liable for consitutional violations proximately resulting from the existence of such de facto policy, even though they acted in good faith and with the best of intentions in the performance of their duties.

Thus, in the present case, the plaintiff seeks to hold the defendants City Manager, John Smith; Police Chief, Daniel K. Dixon; Command Sergeant William Dalton; Command Sergeant Roger Holman and Sergeant William Johnson, respectively, and through one or more of them, the City of Fayetteville jointly liable with the defendant Charles D. McDaniel for actions and inactions taken by them in their representative capacities which plaintiff alleges proximately resulted in the assault upon his person by the defendant Charles D. McDaniel. I may refer to these defendants as representative or supervisory defendants.

In this respect, you are instructed that by joining these supervisory defendants in this action only in their official capacities as representative municipal officials of the defendant City of Fayetteville, plaintiff does not seek to impose individual financial liability upon these defendants. Rather, this procedure provides simply a means of seeking liability against the defendant city. Because under the law a verdict against a supervisory defendant in his representative [21] capacity will be treated as a judgment against the defendant City.

However, by these means, the plaintiff seeks to hold liable those whose edicts, acts or omissions he contends may fairly be said to cause, maintain, tacitly encourage or condone the official or de facto policy, custom, practice or procedure of the defendant City of Fayetteville, so as to specifically affix accountability for the results of their respective actions or inactions.

Members of the Jury, in this respect I specifically charge you that personal participation by a supervisory defendant in any assault upon the plaintiff by the defendant Charles D. McDaniel is not required for you to hold such supervisory defendant liable in his representative capacity. The issue, rather, is whether such a supervisory defendant did something or failed to do something

which he ought to have done which proximately resulted in the assault of the plaintiff Spell by the defendant McDaniel.

Thus, as to each representative or supervisory defendant his liability may be established by the plaintiff's proving by a preponderance of the evidence the following four elements.

First, that the assault by the defendant Charles D. McDaniel upon the plaintiff Henry Z. Spell proximately resulted from a de facto policy, custom, practice or procedure.

[22] And second, the representative defendant of the city developed, caused or maintained such policy, practice, custom or procedure. Or in the alternative, the representative defendant was aware of or reasonably should have been aware of the existence of such a policy, practice, procedure or custom and that he, the representative defendant, had the authority to rectify, nullify or render ineffective such policy, but in conformity with such de facto policy, practice, procedure or custom, he failed to act within the scope of his authority to do so.

And third, such action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others.

And fourth, such action in establishing or causing the existence of such a policy, practice, procedure or custom or in failing to nullify or render it ineffective set in motion a series of acts by others which the representative defendant reasonably should have foreseen would cause his subordinates, including defendant McDaniel, to in fact inflict constitutional injury upon the citizens of the City of Fayetteville or this Federal District.

This fourth element, Members of the Jury, is simply a further definition of proximate cause under these circumstances.

In summary, each of the representative defendants [23] and through them the City of Fayetteville may be held liable jointly with the defendant McDaniel, if you find that such representative defendants' own action or, alternatively inaction, within the scope of the authority of his official capacity amounted to gross negligence or deliberate indifference to the constitutional rights of others, and it proximately resulted in an assault on the plaintiff Spell by the defendant McDaniel.

Official policy directives, regulations or ordinances give rise to municipal liability under 42 United States Code, Section 1983 if such policies proximately lead to a deprivation of constitutional rights. In addition, less than formal municipal conduct can also give rise to the city's liabilities.

Cities like the defendant City of Fayetteville are equally liable for what thet law considers de facto or in fact practices, customs or policies caused, maintained, tacitly encouraged or condoned by their supervisory personnel and which proximately cause a constitutional deprivation. This is so even though these policies, practices and customs have at no time received formal approval through the local government's decision making channels.

Thus, informal actions, if they reflect a general and persistent pattern in practice, may be so common and well settled as to constitute a custom or pattern of official misconduct, that such misconduct may then fairly be said to [24] represent a municipal policy existing in fact. That is to say a de facto policy.

If such a de facto policy expressly or tacitly encourages conduct depriving individuals of their constitutional rights, it is sufficient to impose liability upon the city's repsonsible supervisory personnel and through them, upon the defendant city itself.

Members of the Jury, the term tacit encouragement—by the term tacit encouragement, the law means encouragement expressed or conveyed without words or speech. That is, encouragement implied or inferred from the actions or inactions of a person of authority. In this regard, you should keep in mind that a single isolated act is insufficient to establish a de facto policy. By the same token, the citizens of a municipality do not have to endure an overly widespread or unduly prolonged pattern of past misconduct before municipal liability can be found under 42 United States Code, Section 1983.

In addition, Members of the Jury, a de facto policy can be inferred from the city's omissions as well as from its affirmative acts. If you find these omissions constitute tacit authorization of or deliberate indifference to constitutional injuries. More specifically, I instruct you that where a senior person in a police department has knowledge of a pattern of constitutionally offensive acts by his subordinates, but fails to take remedial steps within the scope of his authority, [25] the city may be held liable for a subsequent violation, if you find the supervisory official's actions or inactions amounted to a deliberate indifference or tacit authorization of the offensive acts.

In determining the question of the existence of such de facto policies, practices, customs or procedures, and therefore, the liability of the representative defendants in their official capacities and through one or more of them, the liability of the city, you should consider insofar as they relate thereto such matters as the nature and sufficiency of the training given to Fayetteville Police Officers, whether or not Fayetteville Police Officer candidates were properly evaluated for their respective jobs, whether or not Fayetteville Police officials condoned or encouraged the use of unnecessary or excessive force by its officers, whether or not the City of Fayetteville, through its police officials, properly investigated allega-

tions of improper police conduct, whether or not officially adopted policies and regulations of the City of Fayetteville Police Department were regularly and properly enforced, whether or not disciplinary procedures were uniformly and fairly applied and administered, and the manner in which police officers who reported improper acts by other police officials were treated by supervisory officials within the Fayetteville Police Department.

I remind you that in order for the plaintiff to prove [26] his claim against a representative defendant, he must prove by a preponderance of the evidence that the de facto policy caused, maintained, tacitly encouraged or condoned by him proximately caused the plaintiff's injury.

And so, Members of the Jury, if after considering the evidence in this case, you should find by a preponderance of the evidence that on November 19, 1983 with respect to each representative or supervisory defendant independently first, that the assault by the defendant Charles D. McDaniel upon the plaintiff Henry Z. Spell proximately resulted from a de facto policy, custom, practice or procedure; and second, that the representative or supervisory defendant developed, caused or maintained such policy, practice, procedure or custom; or in the alternative that the representative or supervisory defendant was aware or reasonably should have been aware of the existence of such a policy, practice, procedure or custom, and the representative or supervisory defendant had the authority to rectify, nullify or render ineffective such policy, but in conformity with such de facto policy, practice, procedure or custom he failed to act within the scope of his authority to do so; and third, such action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others; and fourth, such action in establishing or causing the existence of such a policy, practice, procedure or custom or failure to act to render it ineffective [27] set in mo-

tion a series of acts by others which the representative defendant reasonably should have foreseen would cause his subordinates, including defendant McDaniel, to in fact inflict constitutional injury upon the citizens of the City of Fayetteville or of this Federal District, then it would be your duty to find for the plaintiff on this second issue considering the liability of each supervisory defendant independently.

If you do not so find by a preponderance of the evidence, then it would be your duty to find for the individual defendant, again considering evidence as to each defendant independently.

Your verdict as to each defendant must be unanimous.

Thus, with respect to each supervisory defendant, the second issue for your consideration is whether the assault by the defendant Charles D. McDaniel on the plaintiff Henry Z. Spell proximately resulted from a de facto policy, custom, practice or procedure which the representative or supervisory defendant either developed, maintained or caused or was aware of or reasonably should have been aware of and which the representative defendant had the authority to rectify, nullify or render ineffective, but in conformity with such policy, practice, procedure or custom the defendant failed within the scope of his authority to do so, and whether such action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others.

* * * *

[35] The second issue reads as follows: Did the assault by the defendant Charles D. McDaniel on the plaintiff Henry Z. Spell proximately result from a de facto policy, custom, practice or procedure which a representative or supervisory defendant either developed, maintained or caused or was aware of or reasonably should have been aware of and which the representative defendant had the authority to rectify, nullify, or render ineffective, but in

conformity with such policy, practice or procedure the defendant failed to act within the scope of his authority to do so, and did such action or failure to act amount to gross negligence or deliberate indifference to the constitutional rights of others?

Following this, there is a place to indicate either, yes or no, your decision as it relates to each of the individual supervisory defendants.

The third issue reads: What amount of compensatory damages is plaintiff entitled to recover from the defendants?

* * * *

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No. 87-855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF FAYETTEVILLE, NORTH CAROLINA,
Petitioner

v.

HENRY Z. SPELL,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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---

BRIEF FOR THE RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

The City of Fayetteville will be referred to in this brief as the "Petitioner" or by name. Henry Z. Spell will be referred to as the "Respondent" or by name. References to the Petition for Writ of Certiorari will be designated "(Ptn. ——)." References to the appendix of the Petition for Writ of Certiorari will be designated "(App. ——)." References to the appendix of the Brief in opposition will be designated as "(Resp. App. ——)."

STATEMENT OF THE CASE

Respondent sets forth the salient facts of this case because Petitioner's statement of the case contains inaccuracies and is inadequate to fairly inform the Court of the context and circumstances which relate to the questions that Petitioner seeks to present for review.

A. Introductory Factual Background.

On November 19, 1983, Henry Zebulon Spell, a 27-year old male, was arrested and taken into custody by Fayetteville Police Officer Charles McDaniel for driving while

impaired and possession of Methaqualone. Thereafter, while Spell was handcuffed in the basement of the Law Enforcement Center, Officer McDaniel, apparently angered by Spell's inebriety, assaulted Spell by kneeing him in the testicles with such force that Spell's right testicle was ruptured and shattered to the extent that it had to be surgically removed. Due to a previous infection of his remaining testicle, the kneeing of Spell in the testicles rendered him permanently and irreversibly sterile.[1]

On January 26, 1984, this 42 U.S.C. § 1983 action was instituted by Respondent seeking substantial monetary damages against McDaniel, individually, and against the City of Fayetteville, the Petitioner herein, and certain of its officials named in their official capacities.[2]

Respondent pleaded that the officially named Defendants, or a combination thereof, were "persons" whose "edicts or acts" might "fairly be said to represent the official policy of the City" in law enforcement matters. Respondent also alleged that on the date of his injury, the Petitioner had a *de facto* policy, practice, custom and usuage which encouraged and allowed "aggressive, abusive and assaultive behavior . . . toward individual detainees and arrestees" which "proximately caused" McDaniel to injure Spell.[3]

At trial, Respondent presented twenty-six witnesses to prove the existence of the *de facto* policy which he contended proximately caused the assault by McDaniel. Respondent and an eyewitness to the assault testified that McDaniel assaulted Spell resulting in his injuries. Two

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[1] Pet. App. at 4a.

[2] Suit was instituted prior to this Court's decision in *Brandon v. Holt*, 469 U.S. 464 (1985), and at a time when the state of the law at to the proper means of joining a municipality in a Section 1983 action was in flux. Out of an abundance of caution, Respondent named the City as a party and also named, in their official capacity, those City officials he contended were responsible for the policies that caused his injury.

[3] Pet. App. at 21a.

sheriff's deputies corroborated Spell's complaints of pain and his account of the incident with McDaniel. Respondent's criminal lawyer and his treating physicians testified as to the physical manifestations of his injury and his resulting sterility.

B. The Policymaking Authority of the Chief of Police and his Command Officers.

Seven residents of the City of Fayetteville, in addition to eight present and former police officers, an assistant district attorney, an expert in police civil liability, and a former police legal advisor, all testifed in support of Respondent's allegations of a widespread and persistent *de facto* policy, practice and custom within the Department that authorized and encouraged activities of the very kind which resulted in Respondent's injury. Several officers testified that the use of excessive and unwarranted force by Fayetteville police officers was widespread, persistent and was condoned and encouraged, and in some instances practiced personally by Chief Dixon and the officially named Defendant command officers. They described a repeated pattern of police brutality, excessive force, and other misconduct; they also testified that they had seen rookies being trained how to knee persons in the groin and that McDaniel's kneeing of Respondent was consistent with the training he had received at the Fayetteville Police Academy established by Chief Dixon. They testified that Fayetteville police officers were forbidden by the supervisory Defendants from interrupting or stopping such incidents, and that they were sanctioned when they attempted to register their protests. A twenty-five year veteran of the Police Department testified that the Chief's philosophy was to "kick ass and takes names" and that he wanted "supercops" tougher than even the GIs at nearby Ft. Bragg, and had established his own Police Academy to screen out women and non-aggressive male candidates.[4]

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[4] Pet. App. at 24a.

A former legal advisor for the Police Department testified that disciplinary procedures had broken down within the Department under the Chief's direction, that the Chief advocated the use of excessive force, and refused to allow officers who used excessive force to be disciplined. An Assistant District Attorney testified that in his opinion the Police Department had, for an extended period of time, condoned and encouraged the use of excessive force on arrestees.[5]

Respondent's expert in police administration offered extensive illustrative evidence of reports of Internal Affairs investigations of police misconduct. These documents led the expert to conclude in a pre-trial affidavit:

> What we have here is a dismal and depressing portrait of well-patterned and flagrant police physical abuse. This abuse was known to, condoned by, and in some cases, encouraged by supervisory officials and on numerous occasions such conduct was clearly covered up.

The evidence included instance after instance of police brutality and excessive force, including the beating of a 14-year old child while he was handcuffed and lying on the ground in the presence of his mother and grandmother, the kneeing of a man in his testicles while he was lying on the ground being treated by a medic, persons being pulled from their automobiles and beaten about the head and face while being arrested and handcuffed, and police officers sticking pistol barrels in people's mouths or faces and cocking the hammer back and threatening "to blow their fucking heads off". The testimonial evidence of police brutality, cover-up and misconduct was overwhelming, and with reference to the documentary evidence, the trial court said:

> Finally, the instances of confirmed and uncontradicted misconduct demonstrated in Defendants' own internal affairs documents was, in the court's opinion, devastating to defendant's case.[6]

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[5] Pet. App. at 24a-25a.

[6] Pet. App. at 73a.

Petitioner presented its own expert in police administration who furnished further positive proof that the responsibility for the establishment of policy in the Police Department lay with Chief Dixon and was implemented by him and his "Command officers".[7]

Additionally, *Petitioner* introduced into evidence *its own* officially adopted job description for the Chief of Police and the other officially named police Defendants. These City records clearly set forth that the Police Chief possessed the general authority to set policy for police matters, which he shared with his command officers.[8]

Like many municipalities in this country, the City of Fayetteville had established by its charter a Civil Service Commission which was set up to reduce the influence of politics in hiring, promotion and discharge of City employees. As such, its primary role was to develop a standardized civil service test for applicants for employment and to do appellate review of the few instances where the Chief of Police had imposed discipline so as to prevent the discipline from being politically motivated. The Civil Service Commission at no time had authority to institute investigations of police misbehavior or to institute disciplinary proceedings against members of the Police Department. That authority rested solely with the Police Chief.

Since the adoption of the Council-Manager form of government in 1949, the City of Fayetteville, through its City Council, hired all Police Chiefs and police officers, and funded the entire activities of the Police Department. The Civil Service Commission had no power of taxation and it received its limited funding from the City Council.

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[7] Pet. App. at 26a.

[8] Pet. App. at 27a.

C. First Trial Jury Instructions and F.R.C.P. 51.

Prior to instruction, each party filed proposed written instructions with the court. The court then held a charge conference and presented each party with a copy of its proposed written instructions. Each party then filed written objections to the instructions, and after the court instructed the jury, each party was offered an additional opportunity in open court to register further objections under Rule 51.

Petitioner was offered and seized every available opportunity to ensure that the jury was instructed that, in order to hold the City liable, it was required to determine that the "conduct of (t)he City of Fayetteville, through its official policymakers, *directly* and *proximately* caused" the Respondent to be deprived of his constitutional rights. It did this in its requested jury instruction on causation, in its request that the court define proximate cause according to *Federal Jury Practice and Instructions*, Devitt and Blackmar, 3rd Edition (Proximate Cause, Sec. 80.18), and in further requesting an instruction that the policy in question must have resulted from the officially named Defendant's "gross negligence or reckless disregard" of the constitutional rights of the Plaintiff.

At trial the jury was, in fact, instructed on more than one occasion, that proximate cause was the controlling causation standard.[9]

As to custom and *de facto* policy, the court then charged the jury that "... informal actions ... [which] reflect a *general and persistent pattern and practice*, may be so *common* and *well-settled* as to constitute a custom or practice of official misconduct . . . that . . . fairly represent[ed] a municipal policy existing in fact." [10] It then instructed that "a single isolated act" of misconduct was insufficient to establish the policy.[11]

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[9] Pet. App. at 147a, 150a.

[10] *Id.* (Emphasis added).

[11] Pet. App. at 151a.

The jury was told that in order to find an officially named Defendant liable, it had to determine that the officially named Defendant was a policymaker in the sense that he "developed, caused or maintained such policy . . . or in the alternative . . . was aware of or reasonably should have been aware . . . of such policy . . . and . . . had the authority to rectify, nullify, or render ineffective the policy, but failed to act within the scope of his authority to do so." [12]

At Petitioner's request, the jury was instructed that before imposing liability on the official, the jury must find that the action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others.[13]

Finally, the court charged that the jury must find that the action of the officially named Defendant "in establishing or causing the existence of such policy, practice, custom or in failing to nullify or render it ineffective, set in motion a series of acts by others which the representative Defendant reasonably should have foreseen would cause his subordinates, including the Defendant McDaniel, to, in fact, inflict constitutional injury. . . ." He then referred the jury to his earlier definition of the term "proximate cause" which stated:

> (I)njury or damage is proximately caused by an act or failure to act whenever it appears from the evidence that the act or failure to act in the natural and probable course of events brought about the injury or damage and the injury or damage was of such a character that an ordinary prudent person could reasonably foresee it as likely to occur.[14]

At no time did the Petitioner object to any of the instructions it now seeks to challenge, nor to any of the instructions hereinabove set forth. Further, at the conclusion of the instructions, when offered the opportunity

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[12] Pet. App. at 149a.

[13] *Id.*

[14] *Id.*

to register further objections, Petitioner did not object to any instruction it now seeks to challenge in its Petition.

This failure to object under Rule 51 was presented to the Fourth Circuit panel and was recognized in its opinion.[15]

D. Second Trial.

At the conclusion of the first trial, the jury returned a verdict for the Respondent and assessed damages against McDaniel and against all officially named Defendants who were members of the Police Department, including the Chief of Police, in the sum of $1,000.00. McDaniel and the Petitioner both filed motions for a new trial on all issues, and Respondent filed a motion for a new trial on the issue of damages only. In its motion, the Petitioner argued, ironically, that the jury "was so incensed by its actions that the jury 'jumped over' the issue of McDaniel's liability to get at them." [16] The trial court received briefing and held oral argument on the question. The trial court concluded that "evidence of liability was substantial and with regard to some defendants overwhelming",[17] the "defense appeared to be based upon pure speculation and conjecture",[18] "the record contained[ed] absolutely no indicia of a compromise other than the low amount of damages",[19] and "the issues of liability and damages [were] distinct and separable" [20] and under authority of this Court's opinion in *Gasoline Product Co. v. Champlin Co.*, 283 U.S. 494 (1931), and decisions from the Fourth, Sixth and Eleventh Circuits, ordered a new trial limited to the issue of compensatory damages.

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[15] Pet. App. at 29a.

[16] Pet. App. at 79a.

[17] *Id.*

[18] Pet. App. at 69a.

[19] Pet. App. at 82a.

[20] *Id.*

Petitioner is well aware that under the standard procedure of the United States District Court for the Eastern District of North Carolina, cases are assigned randomly to a particular judge for all proceedings, and when the case is ready for trial, it is scheduled before the judge assigned to the case at the place he is then sitting. In this case, the next term for the District Judge assigned to this case was scheduled in Wilmington for April of 1985, and the case was thus set for retrial in that City. If the Petitioner felt prejudiced by this procedure, it did not voice its concern, for no objection was ever registered.

At the first trial, the Petitioner had denied both the occurrence of the assault and the existence of the alleged policy and custom. Throughout the trial Petitioner repeatedly emphasized the fact that Respondent had been arrested for impaired driving and possession of narcotics in an attempt to attack his credibility. In final argument, defense counsel described Respondent as being "trash", "scum", "garbage", "vermin", and "the lead rat pulling a garbage wagon."

Following the first trial, and during the hearing on the motions for a new trial submitted by all parties, the City's counsel, Robert Cogswell, inquired what findings of fact from the first trial would be treated as conclusive if the court granted Respondent's motion for a new trial limited to the issue of compensatory damages. The Court responded that the City would be precluded from again arguing that McDaniel was not responsible for Spell's injury and claiming that the injury occurred prior to Spell's arrest at the creek bank.

Nevertheless, at the second pre-trial conference, Petitioner persisted in advancing the very contentions which the court had determined would be excluded from consideration in the second trial. Respondent moved to strike these contentions under Rule 11 and moved for sanctions. The court found Petitioner's contentions "so unreasonable and unjustified that a finding of frivolity

[was] mandated. Either the Defendants have deliberately embarked upon the path of disregarding reality or the [contentions] were made with reckless disregard for their continued validity and reasonableness." Sanctions were imposed which included striking the contentions and awarding attorneys' fees. This action was affirmed by the Fourth Circuit without comment.

At the second trial, the Wilmington jury returned a verdict against McDaniel, individually, and against the City, in the sum of $900,000.

E. The Decision of the Fourth Circuit.

The unanimous panel of the Fourth Circuit affirmed. In its opinion, the court initially reviewed all relevant decisions of this Court concerning the scope of municipal liability under 42 U.S.C. § 1983 and concluded that "the substantive requirements for establishing municipal liability are stringent indeed." [21]

After an extensive review of all proceedings below, the unanimous panel found the evidence sufficient to support findings that the Chief of Police "was an authorized policymaker for the City of Fayetteville in matters of law enforcement"; that this authority was, by specific authorization of the City, exercised jointly by the Chief and, among others, the officially named police Defendants; and that the injury to Spell was "in specific accord with and in furtherance of" and a "direct result" of the policy, custom and usage of the Petitioner.[22]

As to jury instructions, the court noted "a substantial question [existed] whether the City objected to the jury instructions at trial and with sufficient specificity to preserve any right to challenge them on appeal." [23] Nevertheless, the court carried out an extensive review of the instructions *sua sponte* and concluded that the instruc-

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[21] Pet. App. at 20a.

[22] Pet. App. at 27a-29a.

[23] Pet. App. at 29a.

tions were "rather remarkable for their overall accuracy and prescience in explaining what at the time was, and still remains, an evolving and difficult body of legal doctrine." [24]

Specifically, the reviewing court was satisfied that "the instructions imposed sufficiently stringent substantive standards at the critical points . . . ; identification of the specific policy or custom claimed . . . ; fair attribution of the policy or custom; and a requisite degree of fault to the City, (and) establishment of a sufficiently close causal connection between policy or custom and specific violation.[25]

Finally, the court expressed "no doubt" that the jury was "sufficiently informed" that municipal liability could only be imposed if it was determined that law enforcement officers to whom the City delegated policymaking authority had exercised their authority in such manner "that the police had been given reasonably to believe that they were generally free to use excessive force in any police-citizen encounter without fear of sanction, and that as a direct result of this informal policy or custom," McDaniel had unjustifiably assaulted Spell.[26]

REASONS FOR DENYING THE WRIT

I. MUNICIPAL LIABILITY WAS IMPOSED BECAUSE OF THE ACTIONS OF THE SUPERVISORY DEFENDANTS IN CREATING AND IMPLEMENTING A *DE FACTO* POLICY, AND NOT ON THE THEORY OF *RESPONDEAT SUPERIOR.*

Petitioner was not held liable solely on the basis of the findings against the supervisory defendants as Petitioner's first question would suggest, but instead liability was imposed because:

(a) a *de facto* policy and custom of police brutality and physical violence existed, and

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[24] Pet. App. at 29a.

[25] Pet. App. at 37a.

[26] Pet. App. at 37a-38a.

(b) said policy and custom was authorized, developed, formulated, condoned, and implemented by Chief of Police Dixon, who had the final authority to prescribe policy in the Police Department, and

(c) said policy was developed, formulated, condoned, approved, and implemented by the Supervisory Defendants who had the authority and ability to stop and prevent the implementation of said policy, but willfully refused to do so, and

(d) as a result of said policy, McDaniel violated Respondent's constitutional rights and injured him.

In *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658 (1978), this Court held that a municipality or other local governing units can be successfully held liable under Sec. 1983 where

> the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers [or where] . . . constitutional deprivations [are] visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels.

436 U.S. at 690-691. The unconstitutional action must be fairly attributable to the municipality, *Spell v. McDaniel*, (See Ptn. App. at 64a), thereby assuring that "municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 465 U.S. 469, 106 S.Ct. 1292, 1298 (1986). Simply stated, Sec. 1983 requires a showing that the unconstitutional conduct occurred pursuant to the "official policy" of the municipality. *Pembaur*, 106 S. Ct. at 1298.

The initial hurdle in imposing municipal liability in a Sec. 1983 action is identifying the "official policy". Petitioner argues that "official policy" can be created only by "official policymakers," and these "official policymakers" *could not*, as a matter of law, and *did not*, under the facts of this case, delegate their authority to create policy. (Ptn. at 19). Specifically, Petitioner contends that

the City Manager, John P. Smith,[27] was a source of "official policy," [28] and that Smith did not promulgate or condone the police department's abusive practices. (Ptn. at 3-4). Petitioner maintains that Smith, on the contrary, "initiated a series of positive, significant measures," (Ptn. at 15), and "as part of his effort to improve the police department," undertook investigative and disciplinary proceedings. (Ptn. at 3).

Such representation by the Petitioner is totally inaccurate. The true facts are that the City Manager's investigations concluded that all complaints against Chief Dixon were unfounded. Additionally, those line officers who made the complaints were publicly chastised by the City Manager for going outside the chain of command in making the complaints, and he made an entry of this reprimand in each officer's permanent record. Dixon and Holman later retired on full pension; Johnson has been promoted to Captain, and Command Sargent Dalton and Patrolman McDaniel are still on the Police Force. Furthermore, in spite of the evidence developed at trial, no disciplinary action was ever taken against any of the defendants in this case and apparently, no such action will ever be taken. The current Chief of Police of the City of Fayetteville has publicly stated recently that he will take no disciplinary action against the officers involved in the Spell matter, and that since the verdict was rendered by "civil" rather than a "criminal" jury, he feels fully justified in ignoring the verdict.

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[27] Petitioner now apparently admits that the City had a policy, but that the policy was not carried out by the police department. This is contrary to the Petitioner's argument at trial and before the court below, that there was *no* policy and/or custom, and for that matter *no* assault.

[28] Petitioner also concedes that Chief Dixon "could lay claim to *Monell* final or ultimate authority," (Ptn. at 21), thereby *conceding* that Dixon's "kick ass and take names" policy was "official policy". Thus, in that the finding of liability of the Chief of Police in his official capacity rendered the Petitioner liable, see *Brandon v. Holt*, 469 U.S. 464 (1985), Respondent contends that the issue herein presented is moot.

Petitioner's argument in this Court as to the identity of the "policymakers" is wholly inconsistent with Petitioner's position at trial. At the initial pre-trial and trial, the City and the other defendants contended and offered evidence to show that Chief Dixon was ultimately responsible for policy in the Police Department, and that City Manager Smith was *not* a policymaker in law enforcement matters and was *unaware* of any problems within the Fayetteville Police Department. Based upon this argument, the jury did not hold Smith liable.

Before the Fourth Circuit, however, the City conveniently modified its position and claimed that Smith and the Civil Service Commission (CSC) were the *only* policymakers in Fayetteville. According to the Petitioner's argument, the only policymaker was Smith (the CSC had not been sued), and since no verdict was rendered against Smith below, the imposition of municipal liability was improper.

Now, in its petition before this Court, the Petitioner argues that City Manager Smith "interrupt[ed] the acquiescence necessary to create a policy or custom and . . . eliminate[d] any causal connection between past acts or omissions of Chief Dixon and the assaults on . . . Spell." (Pet. p. 15)

The crux of the first question raised by the Petitioner therefore is whether a finding of liability against the Petitioner can be based on the acts or omissions of persons subordinate to Smith or Dixon acting in their official capacity. The Petitioner suggests that the finding of the policy and/or custom of its police officers using excessive force on arrestees was not attributable to City policymakers, and therefore, could not be used to impose municipal liability. Given the Petitioner's concession that Chief Dixon was a policymaker, the verdict against Dixon in his official capacity suffices to impose municipal liability, and Petitioner's first question is now moot. *See Brandon v. Holt*, 469 U.S. 464 (1985). Nevertheless, Respondent will address the issue of the supervisory police officials as policymakers.

Official policy can be created affirmatively or by condonation by either the municipality's policymakers or by those to whom policymaking authority has been delegated. *See Pembaur*, 106 S.Ct. 1300; *Spell v. McDaniel* (Ptn. App. at 27a); *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984); *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir. 1984).

"[W]hen execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694.

The courts below found evidence sufficient to establish *both* a policy and a custom attributable to the Petitioner which, when implemented by police officer McDaniel, deprived Spell of his constitutional rights.

The proof that Dalton, Holman and Johnson "along with Chief Dixon" were makers of *de facto* policy by virtue of delegation of policymaking authority and the implementation of the policy included the testimony of the Petitioner's own expert, Glen Murphy, who testified as follows:

> Q: Who makes policy for a police department?
>
> A: Well, let me define what I mean by policy. Policy is the broad overall generalities or guidelines of where a department is going. Policy is established by the chief of police, and in this instance here would be with the concurrence or the acquiescence of the city manager, perhaps. But, the chief of police has the responsibility for overall guidance—the policy. Procedure, which is how that policy is implemented, *is the responsibility of the chief of police to develop in concert with command officers and supervisory officers.*

(Emphasis added). The job descriptions of these defendants in their official capacity included policymaking responsibilities for such things as the conduct, efficiency and performance of the men of their command and the

enforcement of rules, regulations and orders applicable thereto (Pet. App. at 27a).

The Respondent's evidence at trial clearly established that the Petitioner's policies and customs which encouraged such incidents as the assault on Spell were persistent, widespread and ran from the top to the bottom of the police department; and that Dalton, Holman and Johnson, willingly developed and implemented procedures to carry out these policies and customs, and therefore, were responsible jointly along with Dixon for their continued implementation.

The fact that on paper Smith and/or Dixon may have had final decision-making authority cannot insulate the makers of *de facto* policy from liability:

> [I]f a higher official has the authority to overrule a decision, but as a practical matter never does so, the decision-maker may represent the effective final authority on the question.

Bowen v. Watkins, 669 F.2d 979, 989 (5th Cir. 1982).

Policy may be authorized by a municipal official who has either position or *de facto* power. *See, e.g., Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2nd Cir. 1983); *Bowen*, 669 F.2d at 989; *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). In fact, this Court recently refused to grant a writ of certiorari in a case where arguments similar to those of Petitioner were advanced. *See Harris v. City of Pagedale*, 821 F.2d 499 (8th Cir. 1987), *cert. denied*, —— U.S. ——, 56 U.S.L.W. 3403 (1987).

A reading of the cases relied upon by the City reveals no case that supports its position.

Clay v. Conlee, 815 F.2d 1164 (8th Cir. 1987), concerned the victim of a rape who identified Clay, a member of the Arkansas State Police, as her assailant. Within a few hours following his arrest, it was discovered that he was misidentified. Clay thereafter filed an action under § 1983 against Sheriff Conlee in both his individual and official capacity. Clay alleged that Conlee's

subordinates, the arresting officers, lacked probable cause to arrest him, and thereby violated his constitutional rights. The jury returned a verdict in favor of Conlee in his individual capacity, but found against him in his official capacity. The Eighth Circuit noted that both parties seemed to have equated supervisory liability with the liability of a Sheriff in his official capacity. The Court thereafter explained the difference in the two types of actions. The acts of subordinates could be used to impose liability against their supervisor in his *individual capacity*, for his "own culpable action or inaction in the training, supervisor, or control of his subordinates." 815 F.2d at 1170. "A § 1983 action against a government official in his *official capacity*, in contrast, is tantamount to action directly against the public entity of which the official is an agent," *id.* (emphasis added), and it requires a policy or custom being carried out which causes the constitutional violation. In that the trial court failed to instruct the jury that, in order to impose liability against Conlee in his official capacity, it had to first find a municipal policy or custom, "it was insufficient for that reason alone to impose liability against Conlee in his official capacity." *Id.* In the case *sub judice*, the Fourth Circuit found that the trial court sufficiently informed the jury that before it could find liability on the part of the City, it must first find that there was a policy or custom which resulted in McDaniel's assault on Respondent. (Pet. App. at 37a-38a).

The City cites *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984), to stand for the proposition that the Fifth Circuit "interpreted the 'edicts or acts' language in *Monell* to exclude liability as a result of acts of a city's employees 'whatever their rank.'" (Ptn. at 20). What is omitted from that quote, however, is the Court's final phrase of the quoted sentence, "unless in accord with city policy." *Bennett*, 728 F.2d at 769. The following sentence of that opinion places the Court's ruling in the proper context: "Liability must rest on official policy, meaning the city government's policy and not the policy of an individual official." *Id.*

The issue at hand revolves around what is official policy rather than who is a policymaker. If the inquiry were simply whether the act or omission in question was that of a policymaker, then *respondeat superior* would be the standard for finding municipal liability under § 1983, which is contrary to *Monell* and its progeny.

The present case is distinguishable from *Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984), because here, there was evidence presented of the policy and procedure-making roles of *all* supervisory defendants, and the jury could not return a verdict against supervisory defendants unless it determined that *each* such supervisory defendant developed or maintained the policy, or served in a capacity where he could have corrected the policy but because of wilful indifference, failed to do so. In *Webster* "[t]here was no proof . . . whatsoever, that any police officer subordinate to the Chief [of Police] even possibly could have occupied the role of a city policymaker." 735 F.2d at 862.

The Petitioner states that the Fourth Circuit contemplated "a shell game through the use of unsupported propositions such as 'shared responsibility' or the mystic incantation of the word 'delegated' [which] equates decisions of line sergeants in the police department with those possessing policymaking powers." (Ptn. at 19). Respondent respectfully submits that the only shell game found in this case is the one which the City has played with the courts in "designating" its policymaker(s).

II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY TO CONSIDER "TACIT ENCOURAGEMENT" IN DETERMINING THE EXISTENCE OF A *DE FACTO* POLICY.

Petitioner incorrectly asserts that the lower court approved a jury instruction which directed the jury that a finding of "tacit encouragement" established a sufficient causal link between the City's *de facto* policy and the constitutional injury to impose municipal liability. (Ptn. at 21). The City totally misstates or fails to understand

the "tacit encouragement" term found in *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981), and *Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983), as well as the application of that language when used by the trial and appellate court in the case at bar.

The jury in the case at bar was instructed to consider the Petitioner's "tacit authorization" of police department practices in determining the issue of whether there was a *municipal policy*. The instruction was clearly not offered as the required *causal* deprivation. The jury was instructed as follows:

> Cities like the defendant City of Fayetteville are equally liable for what the law considers de facto or in fact practices, customs or policies caused, maintained, *tacitly encouraged* or condoned by their supervisory personnnel and *which proximately caused a constitutional deprivation*. This is so even though these policies, practices and customs have at no time received formal approval through the local government's decision making channels.
>
> Thus, informal actions, if they reflect a general and persistent pattern in practice, may be so common and well settled as to constitute a custom or pattern of official misconduct, that such misconduct may then fairly be said to represent a municipal policy existing in fact. That is to say a de facto policy.
>
> If such a de facto policy expressly or *tacitly encourages* conduct depriving individuals of their constitutional rights, it is sufficient to impose liability upon the city's responsible supervisory personnel and through them, upon the defendant city itself.
>
> Members of the Jury, the term *tacit encouragement*—by the term *tacit encouragement*, the law means encouragement expressed or conveyed without words or speech. That is, encouragement implied or inferred from the actions or inactions of a person of authority. In this regard, you should keep in mind that a single isolated act is insufficient to establish a de facto policy. By the same token, the citizens of a municipality do not have to endure an

> overly widespread or unduly prolonged pattern of past misconduct before municipal liability can be found under 42 United States Code, Section 1983.
>
> In addition, Members of the Jury, a *de facto* policy can be inferred from the city's omissions as well as from its affirmative acts. If you find these omissions constitute *tacit authorization* of or deliberate indifference to constitutional injuries. More specifically, I instruct you that where a senior person in a police department has knowledge of a pattern of constitutionally offensive acts by his subordinates, but fails to take remedial steps within the scope of his authority, the city may be held liable for a subsequent violation, if you find the supervisory official's actions or inactions amounted to a deliberate indifference or *tacit authorization* of the offensive acts.
>
> . . . .

(Resp. App. at 12a-13a.) (Emphasis added).

This instruction was in accordance with the guidelines of cases from the Fourth Circuit, and set forth how tacit condonation by policymakers can create policy. *See also Harris v. City of Pagedale*, 821 F.2d 499, 504 (8th Cir. 1987), *cert. denied*, —— U.S. ——, 56 U.S.L.W. 3403 (1987). The jury was then instructed that upon a finding of *de facto* policy, it must go further and determine if there was a direct causal link between the policy and the injury. The jury was properly instructed that the causal link was established only if the jury found that the injury to Spell "proximately resulted from" *de facto* policies, practices, customs or procedures caused or maintained by the City of Fayetteville. (Resp. App. at 13a). *See Harris*, 821 F.2d at 508. Thus, only upon a finding of *both de facto* policy *and* the direct causal link, could liability be imposed.

The authority on which Petitioner relies to support its position before this Court is totally inapposite to the case at bar. The cases cited by petitioner again address the question of whether a *policy* exists, not the issue of causation. Furthermore, they are "single incident" cases

which have no application in cases, like the one at bar, involving "custom" or *de facto* policy.

As the United States Court of Appeals for the Fifth Circuit has recognized:

> The issue in *Tuttle* was specifically limited to the question of '[w]hether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983.'

Rymer v. Davis, 775 F.2d 756 (6th Cir. 1985), *cert. denied*, —— S.Ct. —— (1987).

In the *City of Oklahoma v. Tuttle*, 471 U.S. 808, 820, 105 S.Ct. 2427, 2434 (1985), Petitioner's "leading authority," this Court plainly stated:

> Respondent did not claim in the District Court that Oklahoma City had a 'custom' or 'policy' of authorizing its police force to use excessive force in the apprehension of suspected criminals, and the jury was not instructed on that theory of municipal liability.

Finally, Petitioner asserts that the concern which Justice O'Connor expressed in her dissent to the Court's dismissal of a writ as improvidently granted in *City of Springfield v. Kibbe*, 107 S.Ct. 1114 (1987), should justify the issuance of a writ in this case. *Kibbe* involved the question of "whether a city can be held liable under 42 U.S.C. § 1983 for providing inadequate police training, and, if so, what standard should govern the imposition." 107 S.Ct. at 1116. Justice O'Connor warned that mere allegations of inadequate, or deficit training, coupled with isolated instances of constitutional deprivation, were insufficient to impose Sec. 1983 liability, in the absence of a nexus between the two. 107 S.Ct. at 1121-1122. *See also Tuttle*, 471 U.S. at 804. The concern expressed by Justice O'Connor in *Kibbe* has no application in the instant case because the facts in *Kibbe* (and *Tuttle*) are so different from the case at bar. In this case, the evidence of a widespread and persistent policy of

police misconduct and cover-up in the Fayetteville Police Department was "overwhelming", and Petitioner's reliance upon "single incident" cases offers no support for its position. In "single incident" cases, naturally there is a higher burden of proof required to connect the single incident and the municipal policy, and the instruction must be tailored to explain this burden. The Petitioner has taken the burden required for "a single incident" case, and is trying to assert that it should apply where the *de facto* policy is widespread and persistent. Such an assertion misinterprets the Respondent's burden in this case. It boils down to the difference between a training program which is deficient because of a lack of instruction as opposed to an affirmative program which advocates the use of excessive force. The evidence in this case amply supports the jury's finding of a widespread policy and custom that encouraged the use of excessive force without fear of sanction as well as a direct causal connection between such policy and custom and the Respondent's injury. The court below recognized this in their opinion, and its decision does not require this Court's attention.

Even assuming *arguendo* that Petitioner's statement accurately represents the law or the facts, the argument has not been preserved for appeal in that the City did not object to the instruction at trial. Furthermore, the City itself requested the causation instructions very similar to the "tacit authorization" language it now seeks to attack, and the City itself approved "proximate cause" as the appropriate nexus to be used.

III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING *DE FACTO* POLICY AND CUSTOM AND USAGE IN 42 U.S.C. § 1983.

As with the other instructions which Petitioner seeks to present as erroneous to this Court, the instruction explaining the "custom or usage" requirement under § 1983 drew no objection from Petitioner at trial, and is therefore waived. In any event, the instruction is supported by precedent from this Court and that of the court

below. *See Wellington*, 717 F.2d 756 and *Avery*, 660 F.2d 111.

The opinion rendered by the court below meets Respondent's argument as follows:

> Finally, the City challenges the court's instructions on the alternative theory of "condoned custom." Essentially, the complaint is that the court did not adequately explain that only a known, widespread "custom or usage" of unconstitutional conduct could be attributed, by condonation of policymaking officials, to the City. Specifically, the City points to a passage from the instructions in which the court instructed that "the citizens of a municipality do not have to endure an overly widespread or unduly prolonged pattern of past misconduct before municipal liability can be found." Again, we find no reversible error in this particular portion of the instructions.
>
> The critical passage challenged simply followed up the court's immediately preceding instruction that what must be found was "a general and persistent pattern in practice . . . so common and well settled as to constitute a custom or pattern of official misconduct," which was then elaborated by the critical admonition that "a single isolated act is insufficient to establish a de facto policy." In this immediate context as well as in the more general context, this passage was therefore a quite acceptable counterpoise, using the qualifiers "overly" and "unduly," to the basic proposition that only practices "general and persistent," "common and well settled," could constitute condoned custom or usage.

(Pet. App. 35a-36a.)

As recognized by this Court in *Tuttle* and by Justice O'Connor in her *Kibbe* dissent, there are certain cases in which a "single incident" is sufficient to establish a policy so long as there is the appropriate nexus. *Tuttle* and *Kibbe* were decided after the trial of this action, and the standard set by the trial court in this case was more stringent than that elaborated in *Tuttle* and *Kibbe*. The burden of the Plaintiff under the circumstances set forth

in *Tuttle* and *Kibbe* is not controlling here, however, because this is not a single incident case, but one in which the evidence established a history of widespread and persistent misconduct.

The Petitioner responds that this Court in both *Adickes v. Kress & Co.*, 398 U.S. 144 (1969) and *Monell* defined custom or usage as covering " 'persistent and widespread' 'permanent and well settled' practices which have been 'deeply embedded traditional ways of carrying out . . . policy.' " (Ptn. at 24). Petitioner's quotations from *Adickes*, when examined in context, however, do not even pertain to the standard for custom or usage. This Court used the quoted passages in explaining that Congress had included the "custom and usage" language in Sec. 1983 "because of the *persistent* and *widespread discriminatory practices* of state officials in some areas of the post-bellum South." *Adickes*, 398 U.S. at 167, *Monell*, 436 U.S. at 691.

The Petitioner either does not understand or refuses to acknowledge that a *de facto* policy (or "custom and usage") is as legitimate a basis for § 1983 liability as an officially stated policy. The City fails to distinguish between the two distinct premises of liability.

In *Monell* this Court recognized and addressed an official governmental policy which was unconstitutional on its face, overruling its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961). By contrast, a *de facto* policy or practice which constitutes "custom or usage" is one in which there is such a widespread or persistent course of action which, although not authorized by written law, is so permanent and well-settled as to have the force of law. Such a policy may be condoned by affirmative consent or by deliberate indifference or wilful disregard to a consistent course of action.

Justice Frankfurter in *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940) explained the distinction between "policy" and "*de facto* policy or custom and usage" when he stated:

> It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law . . . Deeply embedded traditional ways of carrying out state policy . . . are often tougher than the dead words of the written test.

Because the policy of the Petitioner in this case lay not in the spoken, but rather the unspoken directives of its officials, it was a policy that was very "tough" indeed. It was a policy of silent, hidden encouragement, of a wink or a nod of approval, a sidelong glance or a turned back . . . a willingness not to look or see that which was apparent. So that when blame must be assigned, as now it must, those who possessed the authority to stamp out the wrongdoing plead unawareness, or say that the problem was not brought to their attention. They place the blame on their subordinates who carried out the unconstitutional act while claiming that they should go forward untouched, shrouded in the "dead words" of their official and constitutional policy.

IV. PETITIONER HAS WAIVED THE RIGHT TO CHALLENGE THE JURY INSTRUCTIONS ON DAMAGES UNDER 42 U.S.C. § 1983 BY FAILING TO OBJECT AND BY REQUESTING THE INSTRUCTIONS; MOREOVER, THE INSTRUCTIONS ARE CONSISTENT WITH *MEMPHIS COMMUNITY SCHOOL DIST. v. STACHURA.*

Petitioner contends that a Writ should be granted in this case because the jury instructions given at the second trial on the issue of damages conflict with *Memphis Community School Dist. v. Stachura*, —— U.S. ——, 106 S.Ct. 2537 (1986). According to Petitioner, the jury award of $900,000 was excessive,[29] and the allegedly im-

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[29] Petitioner suggests in its "Questions Presented" that the $900,000 verdict was not due to the merits of the case, but resulted

proper jury instructions "played a direct and significant role in the amount of the award." (Ptn. at 27).

A. Petitioner Proffered The Very Instructions At Trial Which It Now Seeks To Contest, Did Not Object To The Instructions At Trial And Did Not Challenge Them In Its Assignment Of Errors To The Court Below.

Before even addressing the merits of Petitioner's argument, Respondent submits that such contentions must fail because they have not been preserved for this Court's consideration. The instructions which Petitioner now attacks were submitted by *Petitioner itself, verbatim,* in its Request for Jury Instructions. (Resp. App. at 21a).

As this Court has recently stated, "there would be considerable prudential objection to reversing a judgment because of the instructions that the Petitioner accepted, *and itself requested.*" *Kibbe,* 107 S.Ct. at 1116 (emphasis added). Petitioner never voiced any objection to the instructions in question. On the contrary, only co-defendant McDaniel's counsel addressed the instruction at all, stating that he was "confused" about the proper way to instruct the jury on the damages available for constitutional violations, and sought the trial court's guidance.

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from "unfair" restrictions placed upon the Petitioner's defense, such as holding the second trial in another city, and excluding evidence on the issue of liability. Petitioner does not offer any argument, however, as to why either of these restrictions constituted error. Nor did Petitioner make any such argument in the court below. Thus, the Petitioner has waived the right to present these questions in this Petition. *See U.S. v. Spector,* 343 U.S. 169 (1953).

To place Petitioner's assertions in proper context, however, the Court should be aware that both Petitioner and Respondent requested a new trial following the first jury's verdict of $1,000.00. Respondent sought a new trial limited to the issue of compensatory damages. After an extensive and exhaustive analysis of the applicable facts and case law, the trial court granted Respondent's motion. (Ptn. App. at 62a-86a). The Fourth Circuit Court upheld this decision, finding ". . . to have proceeded otherwise may well have been an abuse of discretion here." (Ptn. App. at 38a).

By failing to object to the instructions at trial, Petitioner clearly waived its right to attack them on appeal or challenge them in this Petition. *Youakim v. Miller*, 425 U.S. 231 (1976); F.R.C.P. 51; *Bilancia v. General Motors Corp.*, 438 F.2d 621 (4th Cir. 1976). *See also Skogan v. Dow Chemical*, 375 F.2d 692 (8th Cir. 1967) (A party may not sit idly by and allow trial court to commit error, wait for a verdict and complain only if verdict is unfavorable). In any event, Petitioner did not raise the propriety of the instructions in its assignment of errors to the United States Court of Appeals for the Fourth Circuit, nor did it brief the issue or address it in oral argument. Thus, the issue was not properly before this Court or the lower court. *See Trailmobile Co. v. Whirls*, 331 U.S. 40, 48 (1947); *Brown v. Sielaff*, 474 F.2d 826 (3rd Cir. 1973); *Chicago and West Indiana Rail Company v. Motor Ship Buko Maru*, 505 F.2d 579 (7th Cir. 1974).

B. The Jury Instructions On Sec. 1983 Damages Do Not Offend *Stachura* Because They Preclude Jury Speculation On The Value Of Constitutional Rights And Invite Damages Which Are Proportionate To The Actual Injury Sustained.

Even assuming *arguendo*, Petitioner's argument is properly before this Court, it does not on its merits, warrant a writ of certiorari. The instructions on damages which were given by the trial court are not offensive to the opinion of this Court in *Stachura*.

In *Stachura*, 106 S.Ct. 2537, this Court rejected instructions in a § 1983 action which authorized "a separate award of compensatory damages for violation of constitutional rights" and which invited the jury to speculate upon the "abstract" value of constitutional rights and award a dollar amount for the violation of such constitutional rights.

There are several distinctions between the charge in *Stachura* and the charge in the case at bar:

(a) First of all, the charge in *Stachura*, where there was no physical injury, permitted the jury to determine the value of the violation of a constitutional right and award a dollar amount for said violation. The Court in this case, however, instructed the jury that it could determine the amount of Respondent's damage for a personal injury that resulted from the violation of a constitutional right and award a dollar amount for that damage, as opposed to awarding a dollar amount for the violation of a constitutional right which resulted in the injury, and another dollar amount for the injury also.

(b) Secondly, the Court in this case followed established and well-settled instructions relating to the factors to be considered by the jury in determining the amount of damage resulting from the personal injury sustained by the Respondent. The Court in *Stachura*, on the other hand, had no such well-settled instructions or guidelines to give the jury and allowed them to simply speculate without adequate instruction on the value of something that was totally foreign to the average layman.

(c) Thirdly, unlike *Stachura*, the jury in this case was told it could only award "compensatory damages". The jury in the case at bar was specifically given *five* criteria which it could consider in awarding damages. While the Court in its mandate did list the violation of a constitutional right as a matter for the jury to "take into account", *it at no time invited the jury to speculate* as to such things as to "importance of the right in our system of government, the rule which this right has played in the history of our Republic, [and] the significance of the right and context of the activities which the Plaintiff was engaged in at the time of the violation of the right." *Stachura*, 106 S.Ct. at 2541.

The jury in this case was instructed as follows:

> Damages *may not be based upon speculation, because it is only actual damages*, what the law calls compensatory damages *that are recoverable.* However, you are instructed that damages may be

> awarded for the violation of a constitutional right even though these damages may be difficult to quantitatively measure.

(Resp. App. at 18a.) (Emphasis added).

It was at the specific request of Petitioner that the Court further instructed the jurors that damages could be awarded for a constitutional violation, even though difficult to measure, and that the law clearly recognized the "inherent value of constitutional rights, even though difficult to assess." The trial judge continued by informing the jury that compensatory damages were not limited to actual loss of time or money, but could cover both "mental and physical aspects of injury." The jury was told they could consider the Plaintiff's sterility in determining damages. (Resp. App. at 18a).

The jurors were then instructed that they should apply *five criteria* in determing damages: (1) medical expenses; (2) pain, suffering and mental anguish; (3) scars and disfigurement; (4) loss of part of the body and loss of use of part of the body, and (5) permanent injuries and disabilities. (Resp. App. at 18a-19a). During deliberations, the jurors, by a note delivered to the Court, inquired as to whether they should "list damages in five categories for clarification as to how damages were awarded." The court, *with the concurrence of all parties,* responded by stating, "[N]o, a single figure will suffice."

In short, this case presents issues and facts totally different from those in *Stachura.* In *Stachura* the plaintiff was awarded compensatory damages of $275,000 for the brief suspension of his teaching privileges, *even though he remained on salary during the suspension,* 106 S.Ct. at 2540. Respondent herein, however, suffered injuries which were clearly proportionate to the $900,000 award. Handcuffed and inebriated, Respondent was brutally attacked and deliberately kneed with such force that the urologist who examined the Respondent and surgically removed his shattered testicle testified that he

had examined and treated over 30,000 patients during his career, and that the Respondent's injury was worst of this type he had ever seen. Obviously, this injury caused Respondent, who was rendered permanently sterile, excruciating pain, as well as severe and protracted humiliation and anguish.

Yet Petitioner argues that $900,000 is "by no stretch of the imagination" a proper compensatory award because Respondent's medical expenses were only $2,041.74. (Ptn. at 27). This argument is so blatantly insensitive that it is offensive. Respondent submits that this Court should not dignify such contentions by granting a writ of certiorari.

CONCLUSION

For the foregoing reasons and for the further reason that none of the grounds contemplated by Supreme Court Rule 17.1 are present, Respondent urges the Court to deny the Petition For A Writ Of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

CHARGE TO THE JURY

Dated January 28, 1985

* * * *

[9] In a civil action such as this the party asserting a claim has the burden of proving every essential element of his claim by a preponderance of the evidence. This means that the plaintiff has to produce evidence which, considered in the light of all of the evidence in this case, leads you to believe that what the plaintiff contends is more likely true than not. To put it illustratively, if you were to put plaintiff's and defendants' evidence on opposite sides of the scales, plaintiff would have to make the scales tip slightly on his side.

Again, all that the law requires of the plaintiff is that he prove that his contentions are more likely true than not. If the plaintiff fails to meet this burden, the verdict must be for the defendants. But, if this burden is met, your verdict must be for the plaintiff.

Now, Ladies and Gentlemen, you will decide the plaintiff's case in separate phases. The first, as to the defendant McDaniel. And the second, as to the remaining defendants Smith, Dixon, and Dalton, Holman and Johnson as supervisory officials of the Fayetteville Police Department.

Your decision, as to said supervisory officials, will in turn determine the liability, if any, of the City of Fayetteville.

The plaintiff in this case claims damages for per- [10] sonal injuries alleged to have been suffered or sustained by him as the result of the deprivation under color of state and municipal law, statute, custom, practice or usage of a right, privilege and immunity secured to the plaintiff both by the Constitution of the United States

and by an Act of Congress providing for the equal rights of all persons within the jurisdiction of the United States.

Specifically, plaintiff alleges that on November 19, 1983, the defendant Charles D. McDaniel was a duly appointed employed and acting police officer of the City of Fayetteville Police Department. And on that date, within the City of Fayetteville, the defendant Charles D. McDaniel, while acting as a police officer under color of the laws of the State of North Carolina and the ordinances of the City of Fayetteville and the rules and regulations of the Police Department of the City of Fayetteville, did knowingly subject the plaintiff to the deprivation of rights and privileges secured and protected to him by the Constitution and laws of the United States, namely the right of physical integrity to be free from unlawful detention and to be properly cared for and treated as established by the substantive due process provisions of the Fourteenth Amendment, and further the right to be free from unreasonable seizure as established by the Fourth Amendment and the Fourteenth Amendment.

The plaintiff alleges that this deprivation of rights [11] and privileges occurred when the defendant McDaniel assaulted the plaintiff in the Assembly Room of the Cumberland County Law Enforcement Center located in the City of Fayetteville, without just cause or excuse, by kneeing the plaintiff in the testicles, thus resulting in serious and permanent bodily injury and disfigurement to include permanent loss of his right testicle and permanent irreversible sterility, all to plaintiff's damage, which plaintiff alleges to be in the sum of 7.5 Million Dollars.

The plaintiff further alleges that the acts of the defendant Charles D. McDaniel were maliciously and wantonly executed. And by reason thereof, plaintiff alleges enttilement to an award of 2.5 Million Dollars as puni-

tive and exemplary damages from McDaniel, in addition to actual or compensatory damages claimed by plaintiff.

The plaintiff further alleges that the actions of the defendant McDaniel in assaulting him on November 19, 1983 were taken pursuant to, consistent with, under color of and proximately resulted from de facto policy practices, customs or procedures caused, maintained, tacitly encouraged condoned by one or more supervisory officials of the defendant City of Fayetteville.

I shall further instruct you as to the meaning of de facto later in these instructions.

The plaintiff alleges that the supervisory defendants namely John P. Smith, as City Manager; Daniel K. Dixon, Chief [12] of Police; Command Sergeant William Dalton; Command Sergeant Roger T. Holman; and Internal Affairs Sergeant William Johnson, all acting under color of state and municipal law and pursuant to the authority of their offices within the defendant and pursuant to the authority of their offices with the defendant City of Fayetteville, by their respective actions or inaction, proximately caused the defendant Charles D. McDaniel to assault the plaintiff on November 19, 1983.

Therefore, the plaintiff seeks to hold these defendants, and through one or more of them, the City of Fayetteville, jointly liable with the defendant Charles D. McDaniel for his actual or compensatory damages.

The defendants Smith, Dixon, Dalton, Holman and Johnson have been joined in this matter only in their capacity as duly authorized representatives of the defendant City of Fayettevill.e Thus, any judgment rendered against these representative defendants will not subject any of them to individual liability for payment thereof.

Allowing municipal officials to be sued in their representative capacities is simply another means of hold-

ing a municipal authority responsible for the acts of its officials, while at the same time allowing the jury to affix responsibility toward particular public officials.

Thus, the plaintiff seeks to hold these supervisory defendants jointly liable in their representative capacities [13] with the defendant Charles D. McDaniel for plaintiff's actual or compensatory damages.

Our law does not allow punitive damages to be assessed against either a municipal corporation or municipal officers sued in their representative capacity. Therefore, you shall consider the claim for punitive damages only as to the defendant Charles D. McDaniel. I will instruct you as to the law of damages later in these instructions.

Now, Ladies and Gentlemen, as I stated to you earlier, plaintiff in this case claims damages for personal injuries alleged to have been suffered or sustained by him as a result of the deprivation under color of state law of rights, privileges and immunities secured to the plaintiff, both by the Constitution of the United States and by an Act of Congress providing for the equal rights to all persons within the jurisdiction of the United States.

I instruct you that Section 1983 of Title 42 of the United States Code provides that any citizen of this federal district may seek redress in this court by way of damages against any person or persons who, under color of any law, statute, ordinance, regulation or custom knowingly subjects such citizen to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

The statute just outlined for you comprises one of [14] the Civil Rights Acts enacted by the Congress for the express purpose of enforcing the provisions of the Fourteenth Amendment to the Constitution of the United States. That Fourteenth Amendment provides that no

person shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

In order to prove his claim against the defendant Charles D. McDaniel plaintiff must prove to you by a preponderance of the evidence in the case the following four facts: First, that the defendant Charles D. McDaniel on November 19, 1983 knowingly assaulted the plaintiff Henry Z. Spell in the basement of the Cumberland County Law Enforcement Center by kneeing him in the testicles.

Second, that the defendant Charles D. McDaniel at the time of this assault acted under the color of his authority as a police officer of the City of Fayetteville, North Carolina as given to him under the laws of the State of North Carolina, the municipal ordinances of the City of Fayetteville, and the rules and regulations of the Fayetteville Police Department.

Third, that the defendant Charles D. McDaniel's acts and conduct at the time of said assault deprived the plaintiff of his federal constitutional right not to be denied his [15] liberty or property without due process of law, as that phrase is defined and explained in these instructions.

And fourth, that the defendant Charles D. McDaniel's acts and conduct were the proximate cause of the injury and consequent damages to the plaintiff.

Now, with regard to the first element, an act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. It is not necessary to find that the defendant Charles D. McDaniel had any specific intent to deprive the plaintiff of his civil rights in order to find in favor of the plaintiff.

The plaintiff is entitled to relief if the defendant Charles D. McDaniel knowingly acted in a manner which resulted in a violation of the plaintiff's rights.

I further instruct you that acts are done under color or authority of a statute not only when the state officials act within the bounds or limits of their lawful authority but, also when such officers act without or beyond the bounds of their lawful authority.

In this case it is not disputed by the defendants that the defendant Charles D. McDaniel acted under the color of state law so no further proof of the second element of plaintiff's claim against defendant McDaniel is necessary. I therefore instruct you that as a matter of law defendant McDaniel was acting under the color of state law at the time of [16] the alleged assault on November 19, 1983.

The third element of plaintiff's claim against defendant McDaniel is that the alleged assault by McDaniel deprived plaintiff of his liberty without due process of law. To be deprived of one's liberty without due process of law means to be deprived of such rights without authority of law. Before you can determine then whether or not the plaintiff was deprived by the defendant Charles D. McDaniel of any liberty due under the Federal Constitution without due process of law, you must first determine from a preponderance of the evidence whether the defendant Charles D. McDaniel knowingly did the act alleged.

In the context of the present case, you are instructed as a matter of law that under the Constitution of the United States every citizen has the right to liberty and the right to be properly treated while in lawful detention or restraint.

The plaintiff, even though a lawfully detained person, has other liberties among which was the liberty to be free from unlawful attack upon his physical integrity. It has always been the policy of the law to protect the physical

integrity of every person from unauthorized violation or interference no matter who they might be and no matter what they might have done. Thus, the plaintiff even while lawfully detained by the defendant Charles D. McDaniel had the right under the United States Constitution not to be deprived of this remaining liberty involving the physical integrity of his person without [17] due process of law.

In that the defendant Charles D. McDaniel denies that he struck and kneed the plaintiff in the testicles at any time or for any legitimate or justified reason and further denies striking the plaintiff at all, I instruct you that if you find that the defendant Charles D. McDaniel on November 19, 1983 assaulted the plaintiff Henry Z. Spell in the Police Assembly Room of the Cumberland County Law Enforcement Center by kneeing him in the testicles, you need not concern yourself with the third element. That is, the issue of whether such action deprived the plaintiff of a right secured to him by the Federal Constitution. Because such action, in and of itself, would constitute a violation of the plaintiff's constitutional right to physical integrity as a matter of law.

Now, Ladies and Gentlemen, as to the fourth element, injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act in the natural or probable course of events brought about the injury or damage and the injury or damage was of such a character that an ordinarily prudent person could reasonably foresee it as being likely to occur.

This does not mean that the law recognizes only one proximate cause for an injury or damage. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to [18] cause injury or damage. In such a case, each may be said to be a proximate cause.

And so, Members of the Jury, if after considering the evidence in this case, you should find by a preponderance of the evidence that on November 19, 1983 first, the defendant Charles D. McDaniel knowingly assaulted the plaintiff Henry Z. Spell in the basement of the Law Enforcement Center by kneeing him in the testicles; and second, the defendant Charles D. McDaniel's acts and conduct were the proximate cause of the injury and consequent damages to the plaintiff; then, because elements two and three would be established at that point as a matter of law, it would be your duty to find for the plaintiff on this first issue. If you do not so find by a preponderance of the evidence, then it would be your duty to find for the defendant McDaniel. I instruct you that your verdict must be unanimous.

Therefore, as to the question of the liability of defendant Charles D. McDaniel to the plaintiff Henry Z. Spell, you shall be submitted one issue for your consideration which is, on November 19, 1983, did the defendant Charles D. McDaniel assault the plaintiff Henry Z. Spell by kneeing him in the testicles proximately causing injury or damage to the said Henry Z. Spell.

If you answer this issue, no, you shall return to the courtroom for that will constitute a final verdict in this [19] case.

If you answer this issue, yes, you should go on to consider the remaining issues to be submitted to you.

If your answer to the first issue is yes, you will then proceed to issue number two and consider the liability of the supervisory defendants and through them the defendant City of Fayetteville.

In this respect, I charge you that the law provides that local governmental bodies such as the defendant City of Fayetteville are held jointly liable for money damages where it is alleged and found by a preponderance of the

evidence that the unconstitutional action of its employees, servants or agents proximately resulted from de facto regulations, policies, customs or practices of the defendant city, or an agency of the city, such as in this case, the Fayetteville Police Department.

The law further allows municipal or city officials to be held liable for constitutional violations which proximately result from their actions or inactions which constitute gross negligence or willful indifference in the performance of their official duties as representatives of a city such as the defendant City of Fayetteville.

I further charge you that this is so even if those officials use good faith in the performance of their duties. Thus, if their actions or inactions in carrying out their [20] official duties amount to gross negligence in allowing a de facto or official policy to exist or wilful indifference thereto, these officials may be held liable for constitutional violations proximately resulting from the existence of such de facto policy, even though they acted in good faith and with the best of intentions in the performance of their duties.

Thus, in the present case, the plaintiff seeks to hold the defendants City Manager, John Smith; Police Chief, Daniel K. Dixon; Command Sergeant William Dalton; Command Sergeant Roger Holman and Sergeant William Johnson, respectively, and through one or more of them, the City of Fayetteville jointly liable with the defendant Charles D. McDaniel for actions and inactions taken by them in their representative capacities which plaintiff alleges proximately resulted in the assault upon his person by the defendant Charles D. McDaniel. I may refer to these defandants as representative or supervisory defendants.

In this respect, you are instructed that by joining these supervisory defendants in this action only in their official capacities as representative municipal officials of the de-

fendant City of Fayetteville, plaintiff does not seek to impose individual financial liability upon these defendants. Rather, this procedure provides simply a means of seeking liability against the defendant city. Because under the law a verdict against a supervisory defendant in his representative [21] capacity will be treated as a judgment against the defendant City.

However, by these means, the plaintiff seeks to hold liable those whose edicts, acts or omissions he contends may fairly be said to cause, maintain, tacitly encourage or condone the official or de facto policy, custom, practice or procedure of the defendant City of Fayetteville, so as to specifically affix accountability for the results of their respective actions or inactions.

Members of the Jury, in this respect I specifically charge you that personal participation by a supervisory defendant in any assault upon the plaintiff by the defendant Charles D. McDaniel is not required for you to hold such supervisory defendant liable in his representative capacity. The issue, rather, is whether such a supervisory defendant did something or failed to do something which he ought to have done which proximately resulted in the assault of the plaintiff Spell by the defendant McDaniel.

Thus, as to each representative or supervisory defendant his liability may be established by the plaintiff's proving by a preponderance of the evidence the following four elements.

First, that the assault by the defendant Charles D. McDaniel upon the plaintiff Henry Z. Spell proximately resulted from a de facto policy, custom, practice or procedure.

[22] And second, the representative defendant of the city developed, caused or maintained such policy, practice, custom or procedure. Or in the alternative, the representative defendant was aware of or reasonably should

have been aware of the existence of such a policy, practice, procedure or custom and that he, the representative defendant, had the authority to rectify, nullify or render ineffective such policy, but in conformity with such de facto policy, practice, procedure or custom, he failed to act within the scope of his authority to do so.

And third, such action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others.

And fourth, such action is establishing or causing the existence of such a policy, practice, procedure or custom or in failing to nullify or render it ineffective set in motion a series of acts by others which the representative defendant reasonably should have foreseen would cause his subordinates, including defendant McDaniel, to in fact inflict constitutional injury upon the citizens of the City of Fayetteville or this Federal District.

This fourth element, Members of the Jury, is simply a further definition of proximate cause under these circumstances.

In summary, each of the representative defendants [23] and through them the City of Fayetteville may be held liable jointly with the defendant McDaniel, if you find that such representative defendants' own action or, alternatively inaction, within the scope of the authority of his official capacity amounted to gross negligence or deliberate indifference to the constitutional rights of others, and it proximately resulted in an assault on the plaintiff Spell by the defendant McDaniel.

Official policy directives, regulations or ordinances give rise to municipal liability under 42 United States Code, Section 1983 if such policies proximately lead to a deprivation of constitutional rights. In addition, less than formal municipal conduct can also give rise to the city's liabilities.

Cities like the defendant City of Fayetteville are equally liable for what the law considers de facto or in fact practices, customs or policies caused, maintained, tacitly encouraged or condoned by their supervisory personnel and which proximately cause a constitutional deprivation. This is so even though these policies, practices and customs have at no time received formal approval through the local government's decision making channels.

Thus, informal actions, if they reflect a general and persistent pattern in practice, may be so common and well settled as to constitute a custom or pattern of official misconduct, that such misconduct may then fairly be said to [24] represent a municipal policy existing in fact. That is to say de facto policy.

If such a de facto policy expressly or tacitly encourages conduct depriving individuals of their constitutional rights, it is sufficient to impose liability upon the city's responsible supervisory personnel and through them, upon the defendant city itself.

Members of the Jury, the term tacit encouragement—by the term tacit encouragement, the law means encouragement expressed or conveyed without words or speech. That is, encouragement implied or inferred from the actions or inactions of a person of authority. In this regard, you should keep in mind that a single isolated act is insufficient to establish a de facto policy. By the same token, the citizens of a municipality do not have to endure an overly widespread or unduly prolonged pattern of past misconduct before municipal liability can be found under 42 United States Code, Section 1983.

In addition, Members of the Jury, a de facto policy can be inferred from the city's omissions as well as from its affirmative acts. If you find these omissions constitute tacit authorization of or deliberate indifference to constitutional injuries. More specifically, I instruct you that where a senior person in a police department has knowl-

edge of a pattern of constitutionally offensive acts by his subordinates, but fails to take remedial steps within the scope of his authority, [25] the city may be held liable for a subsequent violation, if you find the supervisory official's actions or inactions amounted to a deliberate indifference or tacit authorization of the offensive acts.

In determining the question of the existence of such de facto policies, practices, customs or procedures, and therefore, the liability of the representative defendants in their official capacities and through one or more of them, the liability of the city, you should consider insofar as they relate thereto such matters as the nature and sufficiency of the training given to Fayetteville Police Officers, whether or not Fayetteville Police Officer candidates were properly evaluated for their respective jobs, whether or not Fayetteville Police officials condoned or encouraged the use of unnecessary or excessive force by its officers, whether or not the City of Fayetteville, through its police officials, properly investigated allegations of improper police conduct, whether or not officially adopted policies and regulations of the City of Fayetteville Police Department were regularly and properly enforced, whether or not disciplinary procedures were uniformly and fairly applied and administered, and the manner in which police officers who reported improper acts by other police officials were treated by supervisory officials within the Fayetteville Police Department.

I remind you that in order for the plaintiff to prove [26] his claim against a representative defendant, he must prove by a preponderance of the evidence that the de facto policy caused, maintained, tacitly encouraged or condoned by him proximately caused the plaintiff's injury.

And so, Members of the Jury, if after considering the evidence in this case, you should find by a proponderance of the evidence that on November 19, 1983 with respect to each representative or supervisory defendant independ-

ently first, that the assault by the defendant Charles D. McDaniel upon the plaintiff Henry Z. Spell proximately resulted from a de facto policy, custom, practice or procedure; and second, that the representative or supervisory defendant developed, caused or maintained such policy, practice, procedure or custom; or in the alternative that the representative or supervisory defendant was aware or reasonably should have been aware of the existence of such a policy, practice, procedure or custom, and the representative or supervisory defendant had the authority to rectify, nullify or render ineffective such policy, but in conformity with such de facto policy, practice, procedure or custom he failed to act within the scope of his authority to do so; and third, such action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others; and fourth, such action in establishing or causing the existence of such a policy, practice, procedure or custom or failure to act to render it ineffective [27] set in motion a series of acts by others which the representative defendant reasonably should have foreseen would cause his subordinates, including defendant McDaniel, to in fact inflict constitutional injury upon the citizens of the City of Fayetteville or of this Federal District, then it would be your duty to find for the plaintiff on this second issue considering the liability of each supervisory defendant independently.

If you do not so find by a preponderance of the evidence, then it would be your duty to find for the individual defendant, again considering evidence as to each defendant independently.

Your verdict as to each defendant must be unanimous.

Thus, with respect to each supervisory defendant, the second issue for your consideration is whether the assault by the defendant Charles D. McDaniel on the plaintiff Henry Z. Spell proximately resulted from a de facto

policy, custom, practice or procedure which the representative or supervisory defendant either developed, maintained or caused or was aware of or reasonably should have been aware of and which the representative defendant had the authority to rectify, nullify or render ineffective, but in conformity with such policy, practice, procedure or custom the defendant failed within the scope of his authority to do so, and whether such action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others. This [28] issue shall be answered yes or no as to each supervisory defendant.

* * * *

[34] Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and to change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Remember at all times that you are not partisans, you are judges. You are the judges of the facts and your sole interest is to seek truth from the evidence in the case.

Members of the Jury, when you retire to the jury room to deliberate on your verdict, the first order of business should be the selection of one of your number to serve as your foreman or forelady who will preside over your deliberations and act as your spokesman here in court.

Now, when you go you will be given a verdict form to be completed in the manner in which I have indicated in my instructions. The verdict form contains four issues.

The first issue reads: On November 19, 1983, did the defendant Charles D. McDaniel assault the plaintiff

Henry Z. Spell by kneeing him in the testicles proximately causing injury or damage to Henry Z. Spell?

Following that issue there is the answers, yes or no. [35] And you should mark one of those to indicate your decision in this regard.

Members of the Jury, if you answer "no" to the first issue, you shall inform the Marshal and return to the courtroom, for that will constitute a final verdict in favor of the defendants.

If you answer "yes" to this issue, you shall go on to consider and decide the remaining three issues.

The second issue reads as follows: Did the assault by the defendant Charles D. McDaniel on the plaintiff Henry Z. Spell proximately result from a de facto policy, custom, practice or procedure which a representative or supervisory defendant either developed, maintained or caused or was aware of or reasonably should have been aware of and which the representative defendant had the authority to rectify, nullify, or render ineffective, but in conformity with such policy, practice or procedure the defendant failed to act within the scope of his authority to do so, and did such action or failure to act amount to gross negligence or deliberate indifference to the constitutional rights of others?

Following this, there is a place to indicate either, yes or no, your decision as it relates to each of the individual supervisory defendants.

The third issue reads: What amount of compensatory damages is plaintiff entitled to recover from the defendants?

[36] You should respond to this issue if you answered "yes" to the first issue alone, or "yes" to the first issue and "yes" on the second issue as to any supervisory defendant.

The fourth issue for you to decide is: What amount of punitive damages, if any, is plaintiff entitled to recover from defendant Charles D. McDaniel individually?

As I have indicated earlier, this issue should not be reached unless an award of compensatory damages has been given to the plaintiff.

* * * *

CHARGE TO THE JURY

Dated April 2, 1985

* * * *

[14] In considering the issue of damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the plaintiff's damages and injuries.

Of course, as in any case, the fact that I instruct you on the issue of damages should not be interpreted as an indication by the Court of any amount of damages to be received by the plaintiff.

Damages may not be based on speculation, because it is only actual damages, what the law calls compensatory damages that are recoverable. However, you are instructed that damages may be awarded for violation of a constitutional right even though these damages may be difficult to quantitatively measure.

The law clearly recognizes the inherent value of constitutional rights, even though difficult to assess. Compensatory damages are not restricted to actual loss of time or money. They cover both the mental and physical aspects of injury, tangible and intangible. They are an attempt to restore the plaintiff, that is to say, to make the plaintiff whole or as whole as he was immediately prior to the injury.

Thus, in determining damages, you may consider the plaintiff's inability to father additional children as a result of the assault committed upon him.

[15] A person who suffers personal injury proximately caused by the defendant is entitled to recover in a lump sum monetary award the present worth of all damages, past, present and prospective, which naturally and proximately result from such an injury. Such damages include medical expenses, an award for pain and suffering and

mental anguish, an award for scars and disfigurement, an award for loss of part of the body and loss of use of part of the body, and an award for permanent injuries and disabilities sustained.

I will now explain the law of damages it relates to each of these things.

Medical expenses include the actual amount which you find by the greater weight of the evidence to have been incurred by the plaintiff as a proximate result of defendants' actions for hospital, doctors, drug bills and other medical expenses.

You should further award the plaintiff a sum which will compensate him reasonably for any pain, suffering and mental anguish already suffered by him, and proximately resulting from the injury in question, and for any pain, suffering and mental anguish which you find from the evidence in the case plaintiff is reasonably certain to suffer in the future from the same cause. There is no fixed formula for evaluating pain and suffering. You must determine what is fair compensation by applying logic and common sense to the evidence.

[16] In addition, you may properly consider the evidence introduced in regard to the loss of the physical presence of his right testicle and the resulting disfigurement theretrom. In awarding damages to the plaintiff in regard to disfigurement, you should consider the reasonable compensation for actual physical and mental pain and suffering past, present and prospective. But the award of prospective damages should be made as to the present cash value or the present worth of said damages. And in this case, you are instructed to accept as fact that the plaintiff lost his right testicle, which has rendered him permanently and irreversibly sterile. That is to be considered by you in determining what is fair compensation for those elements of damages which will continue throughout the plaintiff's life. You, the jury, should deter-

mine what is fair compensation for the handicap resulting from such loss. In this respect, you should award the plaintiff, as damages, such amount of money as you find justified by the evidence for the fact that he has been rendered permanently and irreversibly sterile by the action of the defendants.

I also instruct you that since the first jury in this case determined the defendants are liable to the plaintiff for damages, plaintiff is entitled to an award of a reasonable attorney's fee, pursuant to the United States Code Sections 1983 and 1988. However, you should not consider in your deliberations whether or not the plaintiff's attorneys will receive just [17] compensation for their work. This Court, by order, will so award plaintiff's attorneys and such award will be independent of your verdict.

And so, Members of the Jury, in determining how much money will fully and adequately compensate the plaintiff for his damages in this case, I instruct you that you should take into account the following elements and award plaintiff such amount as you find justified by a preponderance of the evidence: medical expenses; pain, suffering and mental anguish; scars and disfigurement; loss of part of the body; and loss of use of part of the body; permanent injuries and disability; and violation of constitutional rights.

Finally, I instruct you that your verdict must represent a considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do without violence to your individual judgment.

* * * *

DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS

Dated March 28, 1985

* * * *

* * * In considering the issue of damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all the Plaintiff's damages and injuries. Of course, the fact that I instruct you on the issue of damages should not be interpreted as an indication by the court of any amount of damages to be received by the Plaintiff.

Damages may not be based on speculation because it is only actual damages, what the law calls compensatory damages that are recoverable in this case. However, you are instructed that damages may be awarded for violation of a constitutional right even though these damages may be difficult to quantitatively measure. The law clearly recognizes the inherit value of constitutional rights, even though difficult to assess.

Supreme Court, U.S.
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CLERK

No. 87-855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF FAYETTEVILLE, NORTH CAROLINA,
Petitioner

v.

HENRY Z. SPELL,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF

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REPLY BRIEF

Although a substantial portion of Respondent's arguments are directed to matters unrelated to the grant of certiorari, the Brief in Opposition does raise matters which warrant a response.

JURY INSTRUCTIONS AND RULE 51

In keeping with an argument endemic in *Monell* litigation, *Kibbe v. City of Springfield*, 107 S.Ct. 662 (1986); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-57 (1981), Respondent contends that all issues (save for that relating to *Brandon v. Holt* and the naming of supervisory defendants as policymakers) are nonreviewable because of an alleged failure to comply with Rule 51. The lower court considered these same arguments and concluded that, on balance, the record warranted full review. There are also a number of additional reasons to support the conclusion that Rule 51 plays no role in this case.

Many of Respondent's arguments that Petitioner waived its right to review the trial court's instruction are not supported by the record.[1] Respondent is correct, however, in pointing out that a portion of the charge at one time was contained in proposed instructions submitted by the Petitioner. One example relates to the granting of damages for violations of constitutional rights.[2] At the time of trial, however, Fourth Circuit precedent mandated its inclusion. This Court's subsequent decision in *Stachura* overruled that precedent. It now represents a clear misapplication of existing law and constitutes "plain error" requiring reversal without reference to Rule 51. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981) (" 'Plain error' review under

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[1] For instance, Petitioner's proposed jury instructions clearly set forth the policy requirement in *Adickes* terms, *i.e.*, a "persistent, widespread practice . . . so common and well-settled as to constitute a custom." See 5A, J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE Par. 51.01, p. 51-28 ("it is not important in what form an objection is made . . . as long as it is clear that the trial judge understood the party's position.")

[2] As made clear in the Petition, however, counsel for Officer McDaniel, who is also a party before this Court, Rule 19.6, did object to this portion of the charge. Petition for Certiorari 12. Similar arguments are made with respect to the "proximate cause"/ "tacit encouragement" segment. Contrary to Respondent's contention, Brief in Opposition 18-22, and as made clear in the Petition, "tacit encouragement" was used in *two* contexts. One related to the "moving force" behind a constitutional violation. Petition for Certiorari 10-11. Moreover, although Petitioner did incorporate a proximate cause segment in its proposed instructions, following the trial this Court decided two cases undermining negligence liability in section 1983 litigation. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). See also *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 812 n.8 (11th Cir. 1987) (dissenting opinion) (" 'affirmative link' between the alleged deprivation and the action or inaction of state officials . . . more stringent than, for example, the proximate cause requirement of tort law."); *Dunster v. Dade County*, 791 F.2d 1516 (11th Cir. 1986), *cert. denied*, 56 U.S.L.W. 3320 (Nov. 3, 1987) (municipal liability based on negligence reversed; intervening decisions in *Daniels* and *Davidson* held to be controlling).

Rule 51 is suited to correcting obvious instances of injustice and misapplied law.")[3]

Finally, this case raises serious, important and unresolved issues with respect to section 1983, the "contours [of which] are currently in a state of evolving definition and uncertainty." *Id.* As with the issue of municipal liability with respect to punitive damages, "the very novelty of the legal issues [presented to this Court and the court below] counsels unrestricted review."

> In addition to being novel, [these questions are] important and appear . . . likely to recur in § 1983 litigation against municipalities. And here the question[s were] squarely presented [below.] [*Id.*]

COLLATERAL ISSUES

Petitioner concedes that there was evidence from which a properly-instructed jury could find that prior to June 1, 1983, Chief Dixon was a policymaker. If the Spell incident occurred prior to that date and if Respondent had proved that the assault in question came about as a direct result of Chief Dixon's alleged explicit or implicit

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[3] It is well settled that on direct review an appellate court must apply the law in effect at the time it renders its decision unless it would cause manifest injustice. *Bradley v. School Bd.*, 416 U.S. 696, 716 (1974). Since the very purpose of Rule 51 is to alert the trial judge of *errors* in the charge so they can be corrected before the jury retires, the policies behind the Rule are not served by applying the Rule to preclude review when precedent intervenes between the time of trial and appeal. *Hegger v. Green*, 646 F.2d 22, 26-7 (2d Cir. 1981). See also *General Beverage Sales Co. v. East-Side Winery*, 568 F.2d 1147, 1152 (7th Cir. 1978) (counsel should not be faulted under Rule 51 for failing to predict changes in the law subsequent to the time a case is appealed); *Williams v. Butler*, 746 F.2d 431, 443-44 (8th Cir. 1984), *aff'd*, 762 F.2d 73 (1985), *vacated and remanded on other grounds sub nom., City of Little Rock v. Williams*, 106 S.Ct. 1508 (1986), *aff'd*, 802 F.2d 296 (8th Cir. 1986), *pet'n for cert. filed*, 56 U.S.L.W. 3048 (July 28, 1987) (error, as a matter of law, to instruct jury on municipal liability for punitive damages; *Fact Concerts* decided after appeal taken). *Contra, Barnett v. Housing Auth.*, 707 F.2d 1571, 1581 (11th Cir. 1983).

encouragement to cover up instances of police brutality, municipal liability would be proper. The incident, however, occurred in November of 1983, almost six months after City Manager Smith took over the Department. Regardless of Respondent's assertions to the contrary, there is sufficient evidence in the record to support a legal and factual conclusion that after June 1, and at the time of the incident, City Manager Smith—not Chief Dixon—possessed and exercised final policymaking authority over the Department.[4]

Petitioner does not concede that there was a proper determination of the existence of a specific "policy" or "policies" which, pursuant to *Adickes*, warranted the imposition of municipal liability. See Brief in Opposition 13 n.27. Specifically, Petitioner contends that under the instruction given, the jury could not properly determine the existence of a policy or custom for at least three reasons. First, in contrast to *Adickes*, policy was defined as something less than an "overly widespread or unduly prolonged pattern of . . . misconduct." Second, although there were introduced into evidence various examples of *de facto* behavior, *e.g.*, inadequate investigations, use of excessive force, the instructions failed to require the jury to draw a nexus between one or more and a properly designated policymaker as the "moving force" behind McDaniel's assault. Third, although Respondent introduced into evidence a catalog of disquieting events which occurred under the regime of Chief Dixon, there is a question as to whether or not they presented a pervasive pattern falling within the *Adickes* definition[5]

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[4] *Cf., Williams v. Butler*, 802 F.2d 296 (8th Cir. 1986), *pet'n for cert. filed*, 56 U.S.L.W. 3048 (U.S. July 7, 1987) (presenting issue as to whether city official was delegated final policy-making authority for purposes of *Monell*).

[5] *Cf., Carter v. District of Columbia*, 795 F.2d 116, 123 (D.C. Cir. 1986) (noting that the cumulative pattern of misbehavior sufficient to reach the *Adickes* definition for "pervasive" remains unquantified).

after City Manager Smith assumed control on June 1, 1983.

CONCLUSION

The City of Fayetteville ultimately may be required to expend in excess of one million dollars of taxpayer funds as a result of what is now commonly referred to as the "Spell incident." If so, it is only right that liability be imposed pursuant to a reasoned process which makes clear exactly why, after taking affirmative steps to remedy perceived defects within its police department, the City should be labeled as a municipality which tolerates and/or promotes brutality on the part of one or more of its police officers. Even more important, however, is the impact of the instant case on political subdivisions throughout the country and the desperate need for clear, definitive and understandable guidelines for the imposition of *Monell* liability resulting from an act by one of their employees.[6]

Respectfully submitted,

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[6] *Cf., City of Canton v. Harris*, 56 U.S.L.W. 3048 (U.S. July 28, 1987) (presenting issue of *Monell* liability for injuries resulting from an alleged *de facto* policy of inadequate training).